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No. 1050

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CRAWFORD MANUFACTURING CO., INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COMEN,
Assistant General Counsel,
BURTON L. RATNER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570,

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	7
C. The decision of the court of appeals	8
Reasons for granting the writ	9
Conclusion	14
Appendix A	15
Appendix B	34
Appendix C	36
Appendix D	139

CITATIONS

Cases:

Aaron Brothers, 158 NLRB 1077	10
Aero Corp., 149 NLRB 128[illegible] enforced, 363 F. 2d 702, certiorari denied, 385 U.S. 973	12
Bauer Welding and Metal Fabricators v. *National Labor Relations Board*, 358 F. 2d 766	13
Bernel Foam Products Co. 146 NLRB 1277	10
Bryant Chucking Grinder Co. v. *National Labor Relations Board*, 67 LRRM 2017	13
Colson Corp. v. *National Labor Relations Board*, 347 F. 2d 128, certiorari denied, 382 U.S. 904	11
Cumberland Shoe Corp., 144 NLRB 1268, enforced, 351 F. 2d 917	8, 12, 13

288-396—68——1

Cases—Continued

	Page
Electrical Workers v. *National Labor Relations Board and S.N.C. Manufacturing Co.*, 352 F. 2d 361, certiorari denied, *sub nom.*, *SNC Manufacturing Co.* v. *National Labor Relations Board*, 382 U.S. 902	11
Engineers & Fabricators, Inc. v. *National Labor Relations Board*, 376 F. 2d 482	13
Englewood Lumber Co., 130 NLRB 394	12
Furr's, Inc. v. *National Labor Relations Board*, 381 F. 2d 562, certiorari denied, 389 U.S. 840	11
Happach v. *National Labor Relations Board*, 357 F. 2d 629	13
Irving Air Chute Co. v. *National Labor Relations Board*, 350 F. 2d 176	11
Jas. H. Matthews & Co., v. *National Relations Board*, 354 F. 2d 432, certiorari denied, 384 U.S. 1002	11, 12
Joy Silk Mills, Inc. v. *National Labor Relations Board*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	10, 12
Master Transmission Rebuilding Corp. v. *National Labor Relations Board*, 373 F. 2d 402	11
National Labor Relations Board v. *Dan Howard Manufacturing Co.*, C.A. 7, No. 16154, decided January 11, 1968	13
National Labor Relations Board v. *Elliott-Williams Co.*, 345 F. 2d 460	11
National Labor Relations Board v. *Glasgow Co.*, 356 F. 2d 476	13
National Labor Relations Board v. *Gorbea, Perez & Morrell*, 300 F. 2d 886	12
National Labor Relations Board v. *Gotham Shoe Manufacturing Co.*, 359 F. 2d 684	13
National Labor Relations Board v. *Logan Packing Co.*, 66 LRRM 2596	13

Cases—Continued

	Page
National Labor Relations Board v. *Nichols Co.*, 380 F. 2d 438	13
National Labor Relations Board v. *Peterson Bros.*, 342 F. 2d 221	13
National Labor Relations Board v. *Sehon Stevenson & Co.*, 66 LRRM 2603	13
National Labor Relations Board v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851	11, 12
National Labor Relations Board v. *Swan Super Cleaners, Inc.*, 66 LRRM 2385	13
National Labor Relations Board v. *Varney Co.*, 359 F. 2d 774	11
National Labor Relations Board v. *Winn-Dixie Stores*, 341 F. 2d 750, certiorari denied, 382 U.S. 830	11, 12, 13
Textile Workers Union v. *National Labor Relations Board and Hercules Packing Corp.*, 66 LRRM 2751	10
United Automobile Workers v. *National Labor Relations Board and Aero Corp.*, 363 F. 2d 702, certiorari denied, 385 U.S. 973	12
United Automobile Workers v. *National Labor Relations Board and Preston Products, Inc.*, 66 LRRM 2548	12

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*)	
Section 8(a)(1)	7, 8, 139
Section 8(a)(3)	7, 139
Section 8(a)(5)	7, 9, 139
Section 9(a)	139
Section 9(c)(1)	140

Statutes—Continued

	Page
National Labor Relations Board Rules and Regulations and Statements of Procedure, 29 C.F.R. 101.18	
Section 101.18	11
Miscellaneous:	
Comment, 75 Yale L. J. 805 (1966)	9
Comment, 33 U. Chi. L. Rev. 387 (1966)	9
Lesnick, *Establishment of Bargaining Rights without An NLRB Election*, 65 Mich. L. Rev. 851 (1967)	9

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CRAWFORD MANUFACTURING CO., INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–33) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 36–135; J.A. 11–111) [1] are reported at 161 NLRB No. 91.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1967 (App. B, *infra*, pp. 34–35). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the Joint Appendix in the court below.

QUESTION PRESENTED

Whether the National Labor Relations Board properly held that cards signed by a majority of the employees in a collective bargaining unit which authorize the union to represent the employees for bargaining purposes establish that the union represents such employees, where the employees were not told that the sole purpose of the cards was to obtain a Board representation election but some of the signing employees believed that the cards would serve only that function.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix D, *infra,* pp. 136–138.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On January 7, 1965,[2] the Amalgamated Clothing Workers of America, AFL–CIO ("the Union"),[3] began an organizing campaign among the Company's employees. On that day, Jay D. Patrick, a national representative of the AFL–CIO, distributed union authorization cards and leaflets at the plant gate (App. C, *infra,* pp. 42–44; J.A. 18–19, 117).[4]

[2] All dates refer to 1965.

[3] The Union intervened in the court of appeals and is a party here.

[4] The leaflet (J.A. 633–634) was entitled, "AN INVITATION TO JOIN. . . ." It described the benefits of union membership, pointed out that the law protected the employees'

About 75 employees attended the Union's first meeting on January 12. Edward Bonnit, a national representative of the Union, spoke first and described the Union and its organizational structure. He told the employees that "if they wanted to have a union they would have to sign a card, that was the first step, and that we would like to have a substantial majority of the people for the union because we could then negotiate in strength * * *." (App. C, *infra*, p. 48; J.A. 23, 119, 142–243.) Patrick then told the employees that he wanted cards signed by 65 percent of the employees because the Company might try to undermine the Union's majority during the campaign. He added that, once the necessary signed cards were obtained, he would make a bargaining demand on the Company. Patrick pointed out, however, that employers did not usually recognize unions on the basis of cards and that the union "generally" had to win an election. After explaining the election process, Patrick read the card

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right to organize, and contained a detachable authorization card. The wording of the card was as follows:

APPLICATION FOR MEMBERSHIP IN THE AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

* * * * *

I, the undersigned, hereby apply for membership in the Amalgamated Clothing Workers of America, and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters pertaining to wages, hours and other conditions of employment.

The card then provided space for the employee to sign his name, and write his address, telephone number, and the name of his employer. The reverse side of the card was addressed, postpaid, to the Union's office in St. Louis, Missouri.

to the employees and passed out cards, together with postage-free return envelopes, stating that the employees could think about the matter further or talk it over with their families, and mail any signed cards to his office (App. C, *infra*, pp. 48, 112–114; J.A. 23–24, 119–122). In answering questions during the general meeting, Patrick, who assumed that the Company was going to insist upon an election, made frequent references to the election (*Ibid.*).

Following his speech and a question-and-answer period, Patrick met with a smaller group of employees who were to act as a volunteer organizing committee to obtain signatures from other employees. Patrick again explained that "if I got enough cards, we would go in and ask the company for recognition, that 99 times out of 100 if we didn't get enough, we had to go to an election, and, therefore, it was important that they get at least 65 percent before we made a move." (App. C, *infra*, p. 48; J.A. 25, 133). When asked whether the employees would immediately become dues-paying members of the Union by signing the cards, Patrick, assuming that an election would be necessary, answered that the cards would be used first to obtain an election and that the signers of the cards would not be joining the Union until after the Union won the election and a satisfactory contract had been negotiated (App. C, *infra*, pp. 49, 109–115; J.A. 25–26, 86–87, 90–91, 251–252).[5]

[5] Patrick gave the same answer to a similar question by an employee at a subsequent meeting on January 19 (see p. 6, *infra*; App. C, *infra*, pp. 55–56, 111–112; J.A. 33, 442–443). At that time, however, the Union had already obtained signatures from a majority of the employees and had made its bargaining demand

On January 18, by which time it had obtained signed authorization cards from more than 100 of the Company's 172 employees, the Union notified the Company by letter that it represented a majority of the employees, offered to prove its majority status through a card check by a disinterested party, and requested an early meeting for the purpose of negotiating a contract. (App. C, *infra*, pp. 49–51; J.A. 26–27, 134; 621–622). The same day, the Union also filed a petition with the Board for a representation election (App. C, *infra*, p. 55; J.A. 32). On January 20, the Company rejected the Union's recognition demand, suggesting that the matter be resolved through the Board's processes (App. C, *infra*, p. 51; J.A. 28, 623).

The Company, meanwhile, began an anti-union campaign on the day after the cards were distributed, when the Company General Manager spoke to groups of employees on Company time and warned them that a union victory could result in the loss of benefits (App. C, *infra*, pp. 44–47; J.A. 21, 167, 455–456). Thereafter, both before and after the union meeting of January 12, one of the Company's supervisors interrogated the employees working under him as to their attitudes towards the Union (App. C, *infra*, pp. 47–48; J.A. 22, 201–202, 278, 281–282). On January 18 and 19, the Company wrote three letters to its employees which warned, "Nothing you have now is assured. Any negotiations may result in less than what you have now," and which advised the employees to ask

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on the Company, although the Company was then encouraging employees to recall their cards.

the Union to return their signed cards (App. C, *infra*, pp. 51–54; J.A. 28, 31–32, 597–600).

On January 19, the Union held its second meeting, attended by about 72 employees. Patrick announced that the Union had obtained signed cards from a majority of the employees and had demanded recognition from the Company. He read the letter which had been sent to the Company, and added that the Union had petitioned the Board for an election in case the Company refused recognition. Patrick then read one of the Company's letters to the employees and announced that he would assist anyone who wished to withdraw his card in obtaining it from the Board's Regional office, to which the cards had been sent along with the Union's petition.[6] (App. C, *infra*, pp. 55–56, 112; J.A. 32–33, 135–137).

Thereafter, and until the Board election was held, Company supervisors and other officials extensively interrogated employees and engaged in other acts of restraint and coercion, including the discriminatory layoff of eight employees (App. C, *infra*, pp. 56–101).

On March 26, the Union lost the Board election by a vote of 86 to 69, with 8 challenged ballots. The Union filed objections to the election alleging that the Company had engaged in misconduct which affected it. At the same time, the Union filed with the Board

[6] One employee, Ada Dill, tried to withdraw. She approached a committee member, but, when told that her card had been forwarded to the Board, she made no further effort to obtain it (App. C, *infra*, p. 113; J.A. 89, 339–340).

charges that the Company had engaged in unfair labor practices, in violation of Sections 8(a)(1), (3), and (5) of the Act. The two cases were consolidated for hearing. (App. C, *infra*, pp. 40–41; J.A. 15–16, 51.)

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of Section 8(a)(1) of the Act; and that the layoff of the eight employees was discriminatorily motivated, in violation of Sections 8(a)(3) and (1) (App. C, *infra*, pp. 85–88; J.A. 63–64). The Board also found that 101 out of 172 employees in the bargaining unit had signed valid cards authorizing the Union to represent them for collective bargaining purposes, and that the Company's refusal to recognize and bargain with the Union violated Sections 8(a)(5) and (1) because it was motivated not by a good faith doubt as to the Union's majority, but rather by a desire to gain time in order to defeat the Union (App. C, *infra*, pp. 99–124; J.A. 76–100). The Board adopted the Trial Examiner's findings that, although some of the employees might have been confused and believed that Patrick had stated that the cards would be used only for an election, Patrick in fact accurately explained the possible uses of the cards and "did not represent either at the general meeting or the later meeting of the organizing committee that the cards would be used

only to obtain an election" (App. C, *infra*, p. 113; J.A. 90–91).[7]

The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily laid off, to bargain with the Union upon request,[8] and to post appropriate notices (App. C, *infra*, pp. 126–128; J.A. 103–105). The Board further ordered that the election be set aside and the Union's representation petition be dismissed (App. C, *infra*, pp. 126, 129; J.A. 102, 105).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's finding that the Company had engaged in restraint and coercion, in violation of Section 8(a)(1) (App. A, *infra*, p. 18). The court, however, refused to sustain the Board's remaining unfair labor practice findings (App. A, *infra*, pp. 18–25).

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[7] The Examiner applied the principle (see *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), discussed *infra*, p. 12) that, since the cards unequivocally authorized the Union to act as collective bargaining agent, they must be treated as valid authorizations absent probative evidence showing that, before they signed the cards, representations were made to the employees by the union solicitors that the cards would be used only for a Board election (App. C, *infra*, pp. 104–105; J.A. 81). Applying this principle, the Examiner found that, except for four employees, whose cards were not counted (App. C, *infra*, p. 123; J.A. 99–100), no such representation had been made by the solicitors.

[8] The bargaining order was prescribed not only as a remedy for the Company's refusal to bargain, but also because the Company's other unfair labor practices had made the holding of a fair election impossible (App. C, *infra*, p. 126; J.A. 102).

With respect to the Section 8(a)(5) finding, the Court, noting that the Examiner had found that some of the employees may have interpreted Union agent Patrick's remarks at the January 12 meeting as a representation that the cards would be used only for an election, held that the record did not support the Board's finding that the cards validly authorized the Union to act as the employees' collective bargaining representative (App. A, *infra,* pp. 20–23). Judge Sobeloff, in dissent, concluded that (App. A, *infra,* p. 29):

> In the light of the card's unequivocal language, the complete absence of any union misrepresentation, the noncoercive atmosphere [in which the Union solicited employee signatures] and the employer's caution to the employees of the important consequences of their signing any union matter, * * * the trial examiner was amply justified in his finding that the signing of the cards was entitled to greater weight than the post-election recall of "some" of the employees * * *.

REASONS FOR GRANTING THE WRIT

The issue whether and under what circumstances a union's representative status may be predicated on authorization cards is an important and recurrent one in the administration of the Act that has recently been the subject of extensive litigation.[9] The court below

[9] The issue also has been the subject of extensive law review comment. See, *e.g.*, Lesnick, *Establishment of Bargaining Rights without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Comment, 75 Yale L.J. 805 (1966); Comment, 33 U. Chi. L.Rev. 387 (1966).

erroneously held that cards which unequivocally authorize the union to represent the signers for purposes of collective bargaining cannot serve to establish the union's representative status where, despite the fact that the union solicitor truthfully explained the cards' possible uses, some employees believed that the cards would be used only to obtain a Board election. The court's decision conflicts with those of two other circuits, and the rationale adopted by the court threatens to impede the prompt enforcement of employees' collective bargaining rights.

1. When a union claims to represent a majority of the employees on the basis of signed authorization cards an employer ordinarily is privileged to insist that a union verify its claim by winning a Board election.[10] The employees' right to be represented by a collective bargaining agent is jeopardized, however, when the employer engages in unfair labor practices which either make it impossible to hold a fair election or render unreliable an election which the union has lost. In such cases, the Board, with court approval, has held that an employer may be ordered to recognize and bargain with the union if it is found that the union had valid authorization cards from a majority of the employees and that the employer's refusal to recognize the union was not premised upon a good faith doubt as to the union's majority status.[11]

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[10] See *Aaron Brothers*, 158 NLRB 1077, 1079–1080 (1966); *Textile Workers Union* v. *National Labor Relations Board and Hercules Packing Corp.* (C.A. 2), No. 135, December 7, 1967, 66 LRRM 2751, 2753–2754.

[11] *Bernel Foam Products Co.*, 146 NLRB 1277 (1964); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d

Although the typical authorization card states, as does the card here, that the signer authorizes the union to represent him for collective bargaining purposes,[12] employers have attempted to refute the union's majority claim by showing that the employees signed under the misapprehension that the card would be used only to obtain a Board election.[13] In view of the unreliability of testimony, given long after the event, as to the employee's subjective state of mind, the Board, with court approval, has held that the act of signing an unambiguous authorization card cannot be

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732, 741–742 (C.A. D.C.), certiorari denied, 341 U.S. 914; *Electrical Workers* v. *National Labor Relations Board and S.N.C. Manufacturing Co.*, 352 F. 2d 361 (C.A. D.C.), certiorari denied, *sub nom. S.N.C. Manufacturing Co.* v. *National Labor Relations Board*, 382 U.S. 902; *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 138–139 (C.A. 8), certiorari denied, 382 U.S. 904; *Jas. H. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 436 (C.A. 8), certiorari denied, 384 U.S. 1002; *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2); *National Labor Relations Board* v. *Varney Co.*, 359 F. 2d 774, 775–776 (C.A. 3); *Master Transmission Rebuilding Corp.* v. *National Labor Relations Board*, 373 F. 2d 402 (C.A. 9); *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 853 (C.A. 1); *Furr's, Inc.* v. *National Labor Relations Board*, 381 F. 2d 562, 568–570 (C.A. 10), certiorari denied, 389 U.S. 840; *National Labor Relations Board* v. *Elliott-Williams Co.*, 345 F. 2d 460, 463–464 (C.A. 7); *National Labor Relations Board* v. *Winn-Dixie Stores*, 341 F. 2d 750, 755 (C.A. 6), certiorari denied, 382 U.S. 830.

[12] The card here even went further and constituted an application for membership in the Union (*supra*, p. 3 n. 4).

[13] In order to obtain a representation election, the petitioning union must make a "showing of interest"; *i.e.*, it must present to the Board cards showing that it has the support of about 30 percent of the employees in the bargaining unit. See National Labor Relations Board Rules and Regulations and Statements of Procedure, Sec. 101.18, 29 C.F.R. 101.18.

impeached by the employee's later testimony that he believed he was signing for some other reason.[14] The Board has held, however, that the card may be impeached by a showing that the union solicitor misrepresented the purpose of the card.[15]

In *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enforced, 351 F. 2d 917 (C.A. 6), the Board established the test for determining whether there has been such misrepresentation: it is necessary to establish that the solicitor indicated to the signer that the card would be used *only* for a Board election; it is not enough to show that he discussed the possibility of an election and that the cards might also be used for that purpose. Accord: *Aero Corp.*, 149 NLRB 1283, 1289–1290 (1964), enforced, 363 F. 2d 702 (C.A. D.C.), certiorari denied, 385 U.S. 973.

2. Two circuits have approved the Board's *Cumberland Shoe* rule. *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc.* (C.A. D.C.), No. 20,137, *et al.*, November 14, 1967, 66 LRRM 2548, 2552–2553; *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, 363 F. 2d 702, 705–706 (C.A. D.C.), certiorari denied, 385 U.S. 973; *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851,

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[14] *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Gorbea, Perez & Morrell*, 300 F. 2d 886, 887 (C.A. 1); *National Labor Relations Board* v. *Winn-Dixie Stores*, 341 F. 2d 750, 755 (C.A. 6), certiorari denied, 382 U.S. 830; *Jas. H. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 437–438 (C.A. 8).

[15] *Englewood Lumber Co.*, 130 NLRB 394 (1961).

855–856 (C.A. 1).[16]

The Fifth Circuit, however, has rejected the rule. *Enginers & Fabricators, Inc.* v. *National Labor Relations Board*, 376 F. 2d 482, 486–487 (C.A. 5); *National Labor Relations Board* v. *Peterson Bros.*, 342 F. 2d 221 (C.A. 5). See also *Bauer Welding and Metal Fabricators* v. *National Labor Relations Board*, 358 F. 2d 766, 774–776 (C.A. 8).

The Fourth Circuit in this case likewise rejected the *Cumberland Shoe* rule and held that the clear meaning of the union authorization cards could be impeached by testimony as to the employees' subjective reasons for signing the cards.[17] Although the record

[16] Three other circuits—the Second, Sixth and Seventh—also have approved the *Cumberland Shoe* rule, but in recent months they have qualified their approval. Compare *National Labor Relations Board* v. *Gotham Shoe Manufacturing Co.*, 359 F. 2d 684, 686 (C.A. 2, Hays, J.), with *National Labor Relations Board* v. *Nichols Co.*, 380 F. 2d 438, 442–445 (C.A. 2, Friendly, J.); see also *Bryant Chucking Grinder Co.* v. *National Labor Relations Board* (C.A. 2), No. 25, December 12, 1967, 67 LRRM 2017, 2018 (Hays, J.), 2019–2022 (Friendly, J., concurring). Compare *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920 (C.A. 6), and *National Labor Relations Board* v. *Winn-Dixie Stores*, 341 F. 2d 750, 754–755 (C.A. 6), certiorari denied, 382 U.S. 830, with *National Labor Relations Board* v. *Swan Super Cleaners, Inc.* (C.A. 6), No. 16952, October 25, 1967, 66 LRRM 2385, 2388–2392. Compare *National Labor Relations Board* v. *Glasgow Co.*, 356 F. 2d 476, 478–479 (C.A. 7), and *Happach* v. *National Labor Relations Board*, 353 F. 2d 629, 631 (C.A. 7), with *National Labor Relations Board* v. *Dan Howard Manufacturing Co.*, C.A. 7, No. 16154, decided January 11, 1968.

[17] See also *National Labor Relations Board* v. *Logan Packing Co.* (C.A. 4), No. 10,355, 66 LRRM 2596, and *National Labor Board* v. *Sehon Stevenson & Co.* (C.A. 4), No. 10,189, 66 LRRM 2603, decided the same day as the instant case.

supports the Board's finding that Union Agent Patrick truthfully explained the possible uses of the cards and did not represent that they would be used only for an election, the court below invalidated the cards simply because some of the employees nonetheless believed that they would be used only for the latter purpose. For the reasons stated by Judge Sobeloff in his dissent (App. A, *infra*, pp. 26–32), we submit that the court erred in invalidating the cards on those grounds.

In view of the divergent views among the circuits with respect to the *Cumberland Shoe* rule, it is appropriate that the Court grant review in this case and resolve the question.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
BURTON L. RAIMI,
Attorney,
National Labor Relations Board.

JANUARY 1968.

Appendix A

United States Court of Appeals
for the Fourth Circuit

No. 11,040.

Crawford Manufacturing Co., Inc., petitioner,
versus
National Labor Relations Board, respondent.
Amalgamated Clothing Workers of America,
AFL-CIO, intervenor

On Petition to Review and Set Aside an Order of the National Labor Relations Board

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(Argued May 31, 1967. Decided October 27, 1967.)

Before Sobeloff, Bryan and Winter, Circuit Judges.

Albert V. Bryan, Circuit Judge:

The National Labor Relations Act, 29 USC 151 et seq., was breached, the Board has found, by the Crawford Manufacturing Company, Inc. at its plant in Emporia, Kansas, in this conduct: interfering with employees in the exercise of their right to organize; discouraging membership in a union by discriminatory lay-offs; and inexcusably refusing to bargain collectively with Amalgamated Clothing Workers of America, AFL–CIO, as the exclusive representative of the

Crawford employees.[1] These acts were laid, respectively, as offending Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.[2]

To effectuate these findings, the Board ordered the employer to desist from further interference and discrimination; to make reparation for the lay-offs; and to bargain with the union. On the parties' cross-petitions, we must say whether substantial evidence on the whole record sustains the Board's condemnation of the employer on all counts. Universal Camera Corp. v. NLRB, 340 US 474 (1951). The interference is adequately proved, we think, but not the discrimination in the lay-offs. Nor do we think Crawford should have been ordered to bargain with the union, for it was not substantially proved to be the employees' representative.

A drive to bring into the ACWA the 172 production and maintenance employees of Crawford at Emporia was opened in December 1964. On January 7, 1965 Jay Dee Patrick, a national representative of the AFL–CIO, distributed folders, each including an application to join, as the workers entered the plant parking lot. The following day General Manager Jones addressed employees from a prepared text, listing the benefits they were receiving from the company and expressing opposition to any unionization.

On January 12 the employees met for the first time for a discussion of the ACWA, with about 75 present. Patrick and Edward Bonitt, a national representative of ACWA, addressed them, explained the structure of the local and national organizations, and at the same time noted a number of advantages of a union.

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[1] Jurisdiction here rests on the fact that the company's principal office is located in Richmond, Virginia: 29 USC 160.

[2] These sections are codified as §§ 29 USC 158(a)(1), 158(a)(3) and 158(a)(5) respectively.

Membership application cards were distributed; an organizing committee was appointed and met with Patrick and Bonitt after adjournment. At the committee meeting questions and answers about the ensuing campaign were exchanged.

By January 18 the union had obtained more than 100 signed cards. On that day Patrick wrote the company stating that a majority of the production, shipping, receiving and maintenance employees had designated ACWA as their collective bargaining agent. He requested an opportunity to demonstrate this authorization and to negotiate a contract on behalf of the employees. The company replied, in a letter dated January 20, that the matters submitted by the union should be "processed through the National Labor Relations Board." During the two days before this reply, the company sent a letter to each employee and issued releases, reiterating the perquisites provided by the company and questioning the advisability of bringing in a union.

The union was busy too. On January 19 Patrick told a gathering of some 72 employees that with authorization cards in hand he had demanded union recognition from the company. At the same time he had lodged with the National Labor Relations Board a petition for an election, anticipating the company's denial of his demand. On the later hearing of the union's petition the company assented to a Board-conducted election for March 26. A spirited campaign followed, with arguments and solicitations presented in letters and leaflets. On the final tally the union lost 69 to 86, with 8 votes challenged.

The complaint in this case, issued on June 18, 1965, charged the company with unfair labor practices in the campaign, consisting of coercive threats and interrogation sufficient to invalidate the election, and

indicted the company for refusing to recognize the union as the employees' representative on the basis of the signed cards.

Section 8(a)(1) Infractions

Confirming its examiner, the Board found that Supervisor Drumwright questioned certain employees about the union meetings and made anti-union remarks. It found also that Superintendent Jenks called two of the organizing committeemen into his office in the early part of March 1965 and impressed upon them the possibility of the loss of current benefits should the union succeed in the election. He engaged other employees in similar conversations. These instances are illustrative of the conduct disapproved by the Board and warranted, we think, the Board's findings of interference and coercion transgressive of Section 8(a)(1).

Section 8(a)(3) Infractions

On February 19, 1965, the day after the consent election was arranged for March 26, 8 employees from various plant departments were laid off. The reason given by the company was a slack period of work. It said, too, that these employees held the lowest seniority and would be recalled as soon as practicable. All but one had signed a union card, and all were called back soon after the election. Three of the 7 returned; the others did not, one because he had entered military service.

The Board rejects the justification offered by the company, particularly in view of the union sympathies of the men and the anti-union disposition of the employer. However, we see no acceptable basis for this discredit of the company. Its officers testified

to the business slump and cited company records in corroboration. We discern no falsification here. Even if mistaken, it was a managerial judgment not impeached as mala fide. None of the suspended employees were replaced by male substitutes, although some additional female workers were taken on during the lay-off. Those released had not been hired for more than four months before, and indisputably their seniority was lower than that of any other workers.

Section 8(a)(5) Infraction—Refusal to Recognize the Union

Acknowledgment of its representation, the union forcefully argues, was required of the company when at least 100 and possibly 105 of the total of 172 employees had on or before January 20, 1965 signed membership applications, and the company advised of this majority. Each of the cards reads as follows:

APPLICATION FOR MEMBERSHIP
in the
Amalgamated Clothing Workers of America,
AFL–CIO
1627 LOCUST ST. ST. LOUIS (3), MO.
CEntral 1–9329

I, the undersigned, hereby apply for membership in the Amalgamated Clothing Workers of America, and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters, pertaining to wages, hours and other conditions of employment.
Name (Please sign):_____
Address: _____
Telephone Number: _____ *Date:* _____
Company: _____
Department: _____ *Operation:* _____

The company contends that these cards did not count because they were signed under a misrepresen-

tation of the union: that the purpose of the card was only to have an election to determine whether the employees desired the union to become their bargaining representative. It was not understood by the employees, the company urges, as an immediate authorization to the union to act as their collective agent. The Board has in the past quite frankly conceded that a card signed under the representation that its *sole* purpose was to obtain an election should not be accepted as an appointment of the union. Bauer Welding and Metal Fabricator's, Inc v. NLRB, 358 F2d 766, 775–76 (8 Cir. 1967).

The company's position is supported by the findings of the Board's examiner. From an experienced feel of the evidence in the case, he sensed that the employees misunderstood the meaning of the cards. Adverting to the first meeting of the employees, January 12, he said:

> "In answering questions Patrick assumed that the Company was going to insist upon an election and consequently made frequent references to the election. These references to the election which Patrick anticipated would be held and his explanation that in the election, no one would know how he voted, neither the Union, the Company, nor their fellow employees would know, I find, *were interpreted by some of the employees at the meeting as indicating that the cards would be used only for the purpose of obtaining an election.* There is much testimony concerning whether Patrick did or did not make such statements at this meeting. . . ." (Accent added.)

Again, to the organizing committee Patrick's statements were to the following effect, the examiner noted:

> "Patrick answered, I find, that the cards would be used first to obtain an election, that *the signers of the cards would not be joining the Union at this time,* that this would be deferred until after the Union had won the election and had succeeded in negotiating a contract satisfactory to the employees. . . ." (Accent added.)

Still again he observed:

> "As indicated above, I further find accordance with the testimony to which I have referred, that when at the subsequent meeting of the organizing committee the question was raised as to the binding effect of the cards, Patrick explained that the cards would be used first to obtain an election, that the signers of the cards would not be joining the union at this time, that this would be deferred until after the Union had won the election and had succeeded in negotiating a contract satisfactory to the employees. In making this finding I do not wish to imply that Patrick conveyed this idea to all his hearers without any confusion on their part. *It is clear to me that much confusion existed in the minds of the employees, including some members of the organizing committee,* and that some genuinely believed that Patrick had expressly stated that the *cards would be used only for the purpose of an election* and no other purpose. . . ." (Accent added.)

At the very least, the findings of the examiner and the testimony of the employees make an issue of whether the cards were signed as a power to the union to act for the employees. Put the other way, the issue is made whether the cards were signed solely to procure an election.

On the question whether the cards evidenced an intentional and intelligent authorization by a majority of the employees to the union to represent them, we

think the burden of proof was on the General Counsel of the Board. Engineers & Fabricators, Inc. v. NLRB, 376 F2d 482, 487 (5 Cir. 1967); Peoples Service Drug Stores, Inc. v. NLRB, 375 F2d 551, 556, 557 (6 Cir. 1967). Regardless, however, of where the burden lay, we are obligated to scrutinize the entire record and ascertain whether there is substantial evidence for the Board's finding here that the union, when it demanded recognition, was representing a majority of the employees. National Can Corporation v. NLRB, 374 F2d 796, 804 (7 Cir. 1967).

The examiner here stated, with ample justification, that there was considerable confusion: some employees thought that by signing the cards they were only calling for an election, and others were confused by the union's representations as to the significance of the cards. Actually, if we spell out of the cards the meaning attributed to them by the examiner—a dual purpose, first the call of an election and then admission to membership—the doubt still lurks, for even then the applicant's membership is, in his own mind, conditioned on a union victory in the election. Proof of such a prevalent and pervading misconception when generated by the union organizers' representations cannot be ignored. It is not decisive that the cards in their terms contained no suggestion that they signified anything less than a direct grant of authority for the union to act as collective agent for the employees. Despite the regard we hold for the contrary opinion, *e.g.*, NLRB v. Cumberland Shoe Corp., 351 F2d 917, 920 (6 Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers. As was said in NLRB

v. Winn-Dixie Stores, Inc., 341 F2d 750, 754 (6 Cir. 1965), cert. den. 382 US 830:

> "The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to the employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect. N.L.R.B. v. Koehler, 328 F2d 770 (C.A. 7); Englewood Lumber Company, 130 N.L.R.B. 394."

In fine, when as here substantial evidence does not show that the employees signed authorization cards free of any misapprehension of their purpose, a union majority entitling the union to representation cannot be said to have existed. Indeed, for the employer to have recognized it in these circumstances would have been a usurpation of the choice of a representative when by Section 9(a) of the Act, the selection belongs to the employees. In the face of such a doubt as presently appears, recognition by the employer is forbidden by law. Garment Workers v. NLRB, 366 US 731, 737 (1961).

It remains for us to discuss the finding of the Board that the refusal of recognition to the union was not because of a good faith doubt of the union's right to speak for the employees. Ordinarily, if the employer has no genuine doubt of the union's claim of a majority, the refusal will not be valid. This proposition, however, has no force here because substantial evidence does not establish the union's majority. This fact wholly undermines the Board's conclusion, based on the absence of good faith, that the company's re-

fusal was unlawful. As was said in NLRB v. Nichols Co., 380 F2d 438, 441 (2 Cir. June 21, 1967), "[L]ack of good faith doubt is immaterial if in fact no majority existed." In accord is NLRB v. Koehler, 328 F2d 770, 773 (7 Cir. 1964).

In conclusion, it is not amiss to note that the Board itself has expressed distrust in cards. NLRB v. Flomatic Corp., 347 F2d 74, 78 (2 Cir. 1965). Our Chief Judge Haynsworth has recently quite forcefully demonstrated the unreliability of cards, and soundly inveighed against their unqualified acceptance as the basis of a bargaining order. NLRB v. S. S. Logan Packing Company, No. 10,355 Decided October 27, 1967.

Having inspected the full record, we are not convinced that the Board's finding has the backing of substantial evidence. There is far too much doubt about the employees' understanding of the cards to permit the conclusion that substantial evidence allows acceptance of the cards for what the union claimed for them. Consequently, we cannot hold that Crawford was required to recognize the union as a qualified demandant to bargain. As the Supreme Court has said: "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Universal Camera Corp v. NLRB, supra, 340 US 474, 488 (1951).

The order of the Board will be enforced insofar as it seeks to correct the Section 8(a)(1) violations; it will not be enforced in respect to the reparations for

the alleged 8(a)(3) violations; and it will not be enforced to compel Crawford to bargain under 8(a)(5).

Enforcement granted in part and denied in part.

SOBELOFF, Circuit Judge, dissenting:

The Board's affirmance of the trial examiner's findings and conclusions is found upon substantial evidence. Consequently, the Board's order should be enforced in its entirety.

While the majority recognizes the "experienced feel" of the examiner and agrees with him that there were serious 8(a)(1) infractions, it inexplicably departs from the examiner's findings on the relatively more important 8(a)(3) and 8(a)(5) violations. As a result, the court administers an ineffectual slap on the wrist of the offending employer for violations of the Labor Act.

The remedy the court grants in this case is virtually meaningless since the unfair labor practices have already achieved their goal, viz., the destruction or at least the chilling of unionization at the particular plant. The only satisfactory cure here is to compel Crawford to bargain under 8(a)(5) and to make appropriate reparations for the layoffs in violation of 8(a)(3).

I

When a union representing a majority of employees in an appropriate unit demands recognition as exclusive bargaining agent, the employer's refusal constitutes an unfair labor practice unless he has a *bona fide* doubt of the union's claim. *NLRB* v. *Overnite Transportation Co.*, 308 F.2d 279 (4th Cir. 1962); *Bilton Industries, Inc.* v. *NLRB*, 297 F.2d 141 (4th Cir. 1961). The majority never reaches the question of the

present employer's good faith doubt because *it* doubts the union's majority claim. In the light of the employer's flimsy excuse for suspicion, which was properly rejected by the trial examiner, the only question for our determination on the 8(a)(5) issue is whether substantial evidence supports the *Board's* conclusion that the union did represent a majority of the eligible employees.

On January 7, 1965 union agent Jay Dee Patrick began the organizing campaign at Crawford by distributing to the workers folders labeled "An Invitation To Join" the "ACWA" and containing a detachable application for membership. The very next day, General Manager Jones, in setting forth the company's opposition to unionization, emphatically warned all the employees to "be careful about signing anything." The employees were thus alerted by no less a source than their employer of the importance and seriousness attending their signing any union document.

At the first meeting of employees on January 12, Patrick and Edward Bonitt, another union representative, discussed unionization generally and authorization cards in particular. Bonitt maintained that it was to the employees' advantage to have cards signed by a substantial majority because of the stronger bargaining position in the negotiations the cards would produce. Patrick then explained authorization cards in more detail.

In the explanatory paragraphs immediately preceding the short excerpt quoted in the majority opinion,[3]

[3] The isolated portion cited by the majority opinion may be misleading if not read in the broader context of the examiner's report. I therefore set out in fuller detail the relevant passages of the trial examiner's decision:

"Patrick said that he wanted to get cards signed by 65 percent of the employees before he approached the Company. He explained that after this was done the Union would request

the trial examiner found, and it is apparently uncontested, that Patrick plainly informed the employees that cards would form the basis of a request to the employer for recognition. However, he noted that as

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recognition as bargaining agent. Patrick went on to say that if the Company was agreeable, they would call in some disinterested outside party to check the cards, and that the Company would not find out who signed. Patrick commented, however, that as a rule employers did not agree to grant recognition on the basis of a card check and that generally the Union had to go to an election. Patrick further explained as follows:

> . . . an election is a pretty much complicated problem from the standpoint that first we have to get at least 30 per cent of the people signed before the government will have an election. Then the government would send an agent when we send the cards to the government and try to set up an election. This was a secret ballot election, that no one would know how they voted, not even the union, the company, nor any of the supervisors nor any of their fellow employees. That the individual, himself, and his own God would know how he voted at the election. There would be no problem that way whatsoever.

Patrick continued that after the election, if the Union won, the employees would nominate a negotiating committee and both the Company and the Union would have to bargain collectively in good faith. Patrick further stated that while he could not promise anything definite, the chances were that as a result of the bargaining the employees' benefits would be increased and that they would not lose any of their present benefits, although they might receive them in a different form.

After reading a membership application card to the employees, Patrick passed them out, together with postage-free return envelopes, and explained that if they wanted to think about the matter further, or talk it over with their families, they could do so and mail the cards back to his office later. Patrick informed the employees about their rights under the Act and the work of the Board in protecting these rights, and asked the employees to be on the alert for violations of their rights.

During the course of the general meeting questions were asked from the floor. Among others, questions were asked con-

a rule employers refuse such a request, thereby necessitating an election. Patrick then proceeded to read aloud the union card, thus emphasizing rather than minimizing the importance of its language.

It is extremely important to note the clear and unambiguous language of the card, which is set out in full in the majority opinion. In unmistakable terms, the signatory applies for union membership and "appoints and authorizes" the union to negotiate as his representative in all matters relating to employment. There are no words even hinting that the sole purpose or any purpose of the cards was to secure an election. Nor was there any such oral representation.

Following his recital of the contents of the card, Patrick distributed cards to the employees together with return envelopes. He did not pressure the employees to sign, but advised them to deliberate their decision and mail the cards, if they so desired, at their leisure.

It was in this setting that Patrick opened the floor for questions. When answering these questions, Patrick referred to an election not because that was the design of the cards but because of his earlier (and accurate) prediction that the employer would probably reject the cards. From a finding that "some" employees misinterpreted Patrick's answer, the ma-

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cerning the benefits which would be sought through the Union. A considerable discussion of piecework rates ensued. In answering questions Patrick assumed that the Company was going to insist upon an election and consequently made frequent references to the election. These references to the election which Patrick anticipated would be held and his explanation that in the election, no one would know how he voted, neither the Union, the Company, nor their fellow employees would know, I find, were interpreted by some of the employees at the meeting as indicating that the cards would be used only for the purpose of obtaining an election."

jority opinion concludes that "*the* employees misunderstood the meaning of the cards." I find this an unwarranted conclusion, directly contrary to the examiner's explanatory statements and ultimate findings of fact that no misrepresentation was made and that the cards and their solicitation were perfectly valid. In summing up, the trial examiner with the "experienced feel" declared:

> "I conclude, as indicated above, that he (Patrick) did not represent either at the general meeting or the later meeting of the organizing committee that the cards would be used only to obtain an election. Rather I find, in accordance with the testimony of Patrick and Bonitt and several of the employees, that Patrick, after reading the text of the card, explained the procedure normally used in obtaining union recognition, stated that it would be followed in this case, but that very likely the Union would have to go to an election."

In light of the card's unequivocal language, the complete absence of any union misrepresentation, the noncoercive atmosphere and the employer's caution to the employees of the important consequences of their signing any union matter, I think the trial examiner was amply justified in his finding that the signing of the cards was entitled to greater weight than the post-election recall of "some" of the employees. As the D.C. Circuit has observed:

> "[A]n employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent."

Joy Silk Mills, Inc. v. *NLRB*, 185 F. 2d 732, 743 (D.C. Cir. 1950). When a large majority of employees has signed a completely lucid and straightforward au-

thorization card, in the absence of any union misrepresentation or coercion, the legal effect may not be dispelled by later reconstruction of subjective impressions of the signers.

That the employees understood or may safely be presumed to have understood the significance of the cards is further evidenced by the events of January 19. On that occasion, Patrick read to the employees the letter he had sent to the company requesting recognition on the basis of the cards they had signed during the previous week. The trial examiner fairly concluded: "It seems unlikely to me that a union representative who only a week earlier had represented to the employees that the cards would be used only for an election would give publicity to an act, which if the Company's position is maintained, amounted to an outright breach of faith." Moreover, following his reading of the letter, Patrick reminded the employees that if they wished they could revoke their authorization. Not one withdrawal was made.

Because of the foregoing facts, largely uncontroverted, I would reject the company's contention that we must disregard en masse the authorization cards as proof of the union's majority. The Board's validation of the cards appears to be based upon more than sufficient evidence. And the excerpted passages of the examiner's report which the majority quotes, and to which I now turn, do not detract from this conclusion.

Patrick's assertion that "signers of cards would not be joining the union at this time" is quite consistent with his earlier explanation of authorization cards and does not support the inference suggested in the majority opinion: As explicitly stated thereon, the card was an *application* for membership. When Patrick was asked if this obligated the signer to pay dues, he truthfully answered that it did not, for, as

the trial examiner found, under the standard union practice no one becomes a dues-paying member until a satisfactory contract has been negotiated with the employer. It was in response to this question about dues that Patrick's statement was made. His statement did not imply any use of the cards to secure an election; rather it stressed the limited purpose of designating the union as the bargaining agent of the employees.

As to the quote about confusion that the "cards would be used only for the purpose of an election," the trial examiner, in a portion of his findings the majority did not deem it important to cite, specifically disavowed any intention of implying that Patrick informed the employees that the primary purpose of the cards was to secure an election. "I find," he wrote, "that Patrick made no such representations."

In addition to claiming widespread vitiating confusion, the company attacked individual authorization cards as the products of union-sponsored misrepresentation. The trial examiner in his decision, meticulously analyzed each card and the conflicting claims surrounding it. As a result, he invalidated several cards, but not enough to destroy the union's majority. Since his conclusions depend almost entirely upon an evaluation of credibility, this court is not in a position to dispute his findings. *Daniel Construction Co.* v. *NLRB*, 341 F. 2d 805 (4th Cir. 1965).

When presented with cards signed by an overwhelming majority, the employer predicated his refusal to bargain solely on his asserted incredulity that the union could have secured so many signatures in so short a time. This hardly suffices as ground for a good faith doubt, and was properly dismissed by the trial examiner as a lame excuse in order to gain time in which to dissipate the union's majority. Since the

employer had no *bona fide* doubt and substantial evidence supports the Board's finding of a validly-obtained majority, it is the court's duty to enforce the Board's bargaining order.

II

The Board's finding of discriminatorily-motivated layoffs is similarly grounded in substantial evidence. Although the employer claims economic circumstances as justification for its actions, the curious timing of the layoffs and the recalls merited a deeper investigation. Upon an extensive analysis of the employer's records, the trial examiner found that the economic claims were pretextuous and that anti-union animus actually motivated the layoffs. The finding cannot be brushed aside as without record support.

On February 19, the day immediately following the signing of the consent election agreement, the company laid off 8 employees, 7 of whom had signed authorization cards. Despite the fact that there was no apparent change in the next month and a half in the sales figures relied upon by the company to support the layoffs, the company recalled all but one of the eight within the week following the election, when, of course, the unionization crisis was over.

Two of the eight were members of the union's organizing committee, the names of which had been submitted to the company. One of these had the same male plant-wide seniority (the criterion used by the company) as an employee known to be anti-union in his sympathies who was not laid off. Two others laid off were victims of the interrogation that led to the 8(a)(1) violations found by the majority; consequently, the views of these two men were also presumably known to the company. In addition, the trial examiner found from other testimony that the com-

pany, through its supervisors, was aware of the union sympathies of the other men laid off. These facts, especially in light of the illegal campaign waged by the employer, strongly suggest an anti-union motivation for the layoffs violative of 8(a)(3). See *NLRB v. Associated Naval Architects,* 355 F. 2d 788 (4th Cir. 1966).

Against this array of evidence, the Company offers the drop in sales from the previous year, to justify its actions. The sales statistics support the company's contention, assuming a substantially similar number of employees during the comparable period in 1964. But the figures prove too much. The slack in sales began two months before the layoffs and, as noted before, continued for two months after the recall. Manifestly there was warrant for the examiner's view that the drop in sales had no causal relationship to the layoffs.

The trial examiner's view of the business situation, it may be conceded, is not inescapable. But in view of the anti-union campaign, the timing of the layoffs and recalls, the known sympathies of those laid off and the questionable nature of the asserted economic justification, the trial examiner's finding has substantial basis in the record considered as a whole, and the Board's reparation order is entitled to enforcement.

Although I concur in the court's enforcement of the Board's 8(a)(1) order, for the foregoing reasons I dissent from the court's refusal to enforce the remainder of the order.

Appendix B

United States Court of Appeals for the Fourth Circuit

No. 11,040

Crawford Manufacturing Co., Inc., petitioner

vs.

National Labor Relations Board, respondent

Amalgamated Clothing Workers of America, AFL–CIO, intervenor

On Petition to Review and Set Aside an Order of the National Labor Relations Board

This cause came on to be heard upon the petition of Crawford Manufacturing Company, Inc., to review and set aside a decision and order entered against it by the National Labor Relations Board on November 15, 1966, in proceedings before the said Board known upon its records as Cases numbered 17–CA–2645 and 17–RC–4687; upon the answer of the National Labor Relations Board and cross-petition for enforcement of said order, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the National Labor Relations Board be, and it is hereby, enforced insofar as it seeks to correct the violations of section 8(a)(1) of the National Labor Relations Act, that en-

forcement is denied in respect to the reparations for the alleged violations of section 8(a)(3) of the Act, and that enforcement to compel Crawford Manufacturing Company, Inc., to bargain under section 8(a)(5) of the Act is denied; and that the said Crawford Manufacturing Company, Inc., abide by and perform the directions of the Board as so enforced contained, in accordance with the opinion of the Court filed herein.

ALBERT V. BRYAN,
United States Circuit Judge.

A true copy,
Teste:

MAURICE S. DEAN,
Clerk, U.S. Court of Appeals for the Fourth Circuit.
By MARGARET L. DAVIS,
Deputy Clerk.

Filed Oct. 27, 1967.

MAURICE S. DEAN, *Clerk.*

APPENDIX C

United States of America

Before the National Labor Relations Board

Cases Nos. 17–CA–2645—17–RC–4687

CRAWFORD MANUFACTURING CO., INC. and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO

DECISION AND ORDER

On April 15, 1966, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceedings, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed cross-exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiners[1] made at the hearing and finds that no prejudicial error was committed.[2] The rulings are here-

[1] Trial Examiner A. Norman Somers was originally designated to be the Trial Examiner in these cases and presided at the first 4 days of the hearing. Thereafter, he became ill, and the Acting Chief Trial Examiner determined that Trial Examiner Somers had become unavailable to the agency within the meaning of Section 5(c) of the Administrative Procedure Act and designated Trial Examiner Vose to resume the hearing. Pursuant to an agreement of the parties, a hearing *de novo* was not conducted with the exception that, at the Respondent's request, the General Counsel recalled one witness, James R. Hayes, who was examined *de novo* by all parties.

[2] The Respondent excepted to "the rulings of [the] Trial Examiner . . . that Respondent was required to take as his own the witness of the General Counsel, through whom an authorization card had been introduced, when the Respondent inquired into representations made to the employee prior to the time of signing it. . . ." The Respondent asserts that this ruling denied to Respondent "the constitutional right to cross-examination."

Although the Trial Examiner stated that the Respondent would have to take witnesses for the General Counsel as his own if it wanted to make such inquiries, the effect of his ruling was that Respondent would not be permitted to ask leading questions of such witnesses until it had exhausted, by direct questions, their recollection of the circumstances under which they had signed authorization cards. Although this ruling restricted Respondent's right to ask leading questions initially, the Respondent was not precluded from inquiring into the circumstances under which the cards were obtained, and the record reflects that Respondent did so inquire of many witnesses. Further, after the recollection of a witness was exhausted, the Trial Examiner permitted Respondent to ask leading questions. We believe that this ruling imposing a conditional limitation on the use of leading questions was within the scope of the Trial Examiner's discretion and was not erroneous. See *Bryant Chucking Grinder Company*, 160 NLRB No. 125.

Moreover, such leading questions as proposed by Respondent are entitled to little probative weight in determining whether

by affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the cross-exceptions, the briefs, and the entire record in these cases, and hereby adopts the Trial Examiner's findings,[3] conclusions, and recommendations, with the following modifications.

1. Although the Trial Examiner found that employee Bibiano Sanchez was laid off for discriminatory reasons, he found that Respondent's failure to offer reinstatement to Sanchez at the time it offered reinstatement to the other employees was not violative of the Act. The Trial Examiner credited the testimony of Respondent's Manager Jones that supervisors requested that Sanchez not be offered reinstatement

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employees signing authorization cards were told before signing that the cards were only for the purpose of obtaining an election. In *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 919 (C.A. 6), enfg. 144 NLRB 1268, the Court cited with approval the following quotation from the Board's decision, as amended:

> The record indicates that the testimony to this effect [that some signatories to authorization cards had testified that they were told that the purpose of the cards was to obtain a Board election] consisted of affirmative responses by the signatories to leading questions propounded by Respondent's counsel, upon cross-examination, as to whether they were told that the purpose of the cards was to secure an election. We do not deem such testimony sufficient to controvert the statement of the purpose and effect of such cards contained on the face thereof, nor do we consider it inconsistent with an understanding that the cards served the dual purpose of designating a representative and of securing an election.

Accordingly, we find that the Trial Examiner's ruling in question, even if erroneous, was not prejudicial.

[3] No exceptions were filed to the Trial Examiner's findings that the Respondent did not violate Section 8(a) (3) and (1) by discharging employee Mildred Jarvis and that Respondent did not violate Section 8(a)(1) by denying the Union's request for equal time to answer Respondent's arguments against joining the Union and for equal access to the Respondent's bulletin boards. Accordingly, we adopt such findings *pro forma*.

because "he couldn't sweep the floor or do anything." The General Counsel excepts to this finding and contends that the Trial Examiner should have credited Sanchez's testimony that Respondent's Superintendent Jenks told him that he was not being recalled because he "had come in to vote at the election." However, the Trial Examiner specifically discredited Sanchez's testimony. Since the clear preponderance of the evidence does not convince us that this credibility resolution of the Trial Examiner is incorrect, we adopt the Trial Examiner's conclusion that the Respondent's failure to offer Sanchez reinstatement was not violative of the Act.[4]

2. We do not adopt the Trial Examiner's finding that Respondent's Manager Jones violated Section 8(a)(1) by warning each member of the organizing committee that "any outside activities that interfered with [his] work would call for dismissal." The Trial Examiner found that this warning violated Section 8(a)(1) in view of the frequency with which Respondent's officials and supervisors utilized company time to convey to employees their arguments against the Union. Jones' warning was that working time was for work and was lawful.[5] It was not made unlawful by the circumstance that Respondent itself interfered with production by making its arguments to employees during working time.[6]

3. Respondent admits that Supervisor Drumwright's questioning of employees about their union sentiments and his threat to one employee that members of the organizing committee "would probably be let go after the election" were coercive. However,

[4] *Standard Dry Wall Products*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[5] *Peyton Packing Company, Inc.*, 49 NLRB 828, 843, enfd. 142 F. 2d 1009 (C.A. 5), cert. denied 323 U.S. 730.

[6] *N.L.R.B.* v. *United Steelworkers of America* (*NuTone, Inc.*), 357 U.S. 357.

Respondent contends that Manager Jones' neutrality talk to the employees on February 19 dissipated the coercive effect of Drumwright's conduct. In light of the other violations committed by Respondent both before and after the neutrality talk, we find that it did not dissipate the coercive effect of Drumwright's conduct and, in agreement with the Trial Examiner, we find further that Drumwright's conduct violated Section 8(a)(1).[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Crawford Manufacturing Co., Inc., Emporia, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated Washington, D.C., November 15, 1966.

FRANK W. MCCULLOCH,
Chairman,

HOWARD JENKINS, JR.,
Member,

SAM ZAGORIA,
Member,

[SEAL] *National Labor Relations Board.*

[Title deleted]

[1] In so finding, however, we do not, as did the Trial Examiner, rely upon General Manager Jones' warnings to the members of the organizing committee. The other violations committed by Respondent are sufficient to dissipate the effect of the neutrality talk.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

These cases, involving both objections to conduct affecting the results of an election and an unfair labor practice charge filed by the Charging Party (hereinafter referred to as the Union) on March 29, 1965, were heard at Emporia, Kansas, by Trial Examiner A. Norman Somers on August 31 through September 3, 1965, and by Owsley Vose, the undersigned Trial Examiner, on November 30 through December 3, 1965, pursuant to a consolidated complaint issued by the General Counsel of the National Labor Relations Board on June 18, 1965.[1] The consolidated complaint alleges that the Respondent refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act, laid off or discharged nine employees in violation of Section 8(a)(3) and (1) of the Act, and engaged in threats and interrogation, and denied the Union equal time to answer the Respondent's antiunion speeches and equal access to

[1] While the hearing was in recess in September, Trial Examiner Somers became seriously ill. In November, when it became apparent that Mr. Somers would not be able to resume the hearing within a reasonable period of time, Acting Chief Trial Examiner Charles W. Schneider determined that Mr. Somers had become unavailable to the agency within the meaning of Section 5(c) of the Administrative Procedure Act and designated the undersigned Trial Examiner to resume the hearing. In his order designating me Trial Examiner, Mr. Schneider provided that the parties could request a hearing *de novo*, if they so desired. The parties, however, decided against this course, with the exception that, at the Respondent's request, the General Counsel recalled one witness, James R. Hayes, and he was examined *de novo* by all parties.

its bulletin boards, in violation of Section 8(a)(1) of the Act. After the close of the hearing the General Counsel and the Respondent filed briefs which have been fully considered.[2]

Upon the entire record, including my observation of the witnesses who appeared before me, I make the following:

Findings and Conclusions

I. The business of the Respondent

The Respondent (hereinafter called the Company) is engaged at Emporia, Kansas, in the manufacture of hassocks, cushions, seat pads, life preservers and related products. The Company annually receives from, and ships to, points outside of Kansas, more than $50,000 worth of materials, goods and products. Upon these facts, I find, as the Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. *Brief outline of the facts; issues involved*

After an organizing drive carried on for the most part during the second week in January 1965, the

[2] After the hearing the General Counsel filed a motion to correct the transcript. No objection having been filed thereto, and it appearing proper, the General Counsel's motion is granted and the record is corrected as prayed therein.

Union wrote the Company a letter in which it asserted that it represented a majority of its employees, offered to prove its majority status by submitting its cards to a disinterested person for a card check, and requested a conference for the purpose of commencing collective-bargaining negotiations. Without waiting for a reply, the Union filed with the Board's Regional Office at Kansas City, Missouri, a petition for certification as bargaining representative of the Respondent's employees. The Company by letter dated January 20 refused to grant the Union's requests, declaring that the matters raised in the Union's letter should be handled through the Board's procedures. About a month later the Company entered into a Stipulation for Certification upon consent election.

The General Counsel contends that from the time the Company first heard of the union membership drive it engaged in a vigorous campaign to prevent the Union from achieving bargaining rights, including questioning employees about their union sympathies, threatening that adverse consequences would follow from designating the Union as bargaining representative, offering a benefit to an employee to secure a vote against the Union in the election, soliciting withdrawals from the Union, and laying off and discharging employees because of their union activities. At the election which was held on March 26, 1965, the Union lost, 69 to 85, with 8 challenged ballots.

The General Counsel further urges that the Company's various efforts to bring about the defeat of the Union in the election brings the case within the decisions of the Board in *Bernel Foam Products Co.*,

146 NLRB 1277 and *Irving Air Chute Co.*, 149 NLRB 627, and that in accordance with these decisions, the election should be set aside and the Company be required to bargain with the Union forthwith.

The Company, while admitting that it engaged in a vigorous campaign to defeat the Union in the election, contends, with the one possible exception noted below, that its conduct was completely lawful, that the layoffs or discharges here involved were all for cause, and that there is no basis whatever for entering a bargaining order in this case. The Company does not dispute that Lee Drumwright, admittedly one of its supervisors, may have engaged in several acts of interference, but contends that these were isolated acts and were exculpated by an announcement by Linwood Jones, the Company's vice president and general manager, on February 19, which is discussed more fully below.

B. Sequence of events

Jay Dee Patrick, a national represenative of the AFL–CIO, went to Emporia in December 1964 and sought to interest the employees of various employers in the vicinity, including the Company's, in organizing. A few of the Company's employees became interested at this time.

On January 7, 1965 Patrick passed out folders to employees at the plant gate as they entered the Company parking lot. On the cover of the folder was printed in letters ½ inch high "An Invitation to Join" the "ACWA." Above a detachable Application For Membership form inside the folder was a mes-

sage stressing the benefits won by members of Amalgamated Clothing Workers of America.[3]

The next day General Manager Jones had all of the Respondent's employees assembled in groups and read to each group, successively, a speach. The text from which Jones read is as follows:

JANUARY 8, 1965.

TO OUR EMPLOYEES:

Yesterday an outside union organizer handed all of our employees an invitation to join an outside union.

You are entitled to know the position of your company on this question. We are opposed to unionization and these are the reasons why.

You understand of course, that these people are paid union organizers who don't know you. Their main interest is getting you to join their union so they can live off of the monthly dues

[3] The full text of this card is as follows:

APPLICATION FOR MEMBERSHIP

in the

Amalgamated Clothing Workers of America, AFL-CIO

1627 LOCUST ST. CEntral 1-9329 ST. LOUIS, (3)MO.

I, the undersigned, hereby apply for membership in the Amalgamated Clothing Workers of America and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters pertaining to wages, hours and other conditions of employment

Name (Please sign):----------

Address: ----------

Telephone Number:---------- Date: ----------

Company: ----------

Department: ---------- Operation: ----------

Signed: ----------

and membership fees that you will pay them. These are honest facts and you know I would not say this if it were not true.

Be careful about signing anything. Don't be persuaded by anyone, or by the propaganda and sales pitch that the unions put out. Remember, union cannot get you a single thing that you can't get for yourself without these outsiders trying to come in between us.

Here are some of the benefits that you receive. No union got these things for you:

1. Sick Pay. You are paid your basic wage after a three-day waiting period when you are out sick for any reason even if you are hurt in an auto accident on a Sunday.
2. Two Weeks Paid Vacation after one year of service.
3. Free Hospitalization, Surgical and Life Insurance for you and your dependents at no cost to you. (Surgical Insurance was just added this past October.)
4. Seven paid Holidays. (Day after Thanksgiving was just added last November.)
5. Profit Sharing Bonus. Something very unusual for a small company of our size.
6. Pension Plan after 5 years of service. Paid for by your company—no cost to you.

I am grateful for the kind of personal contact that now exists in our plant and I feel confident that you appreciate its value as much as I do. There never has been a time when you could not bring any problem direct to your supervisor or myself. Outsiders don't know your problems.

If any of you have any questions, you may come to us. If any of you are bothered by these outsiders at your home or any other place, you may tell them to leave, same as you would any other salesman trying to sell you something you didn't want to buy.

I want to thank you again for your loyal support and fine cooperation.

LINWOOD JONES.

Questions were asked at the conclusion of at least one of these speeches. In answer to questions, Jones brought out that if the Union came in there was no assurance that present benefits would be retained, stating that it depended on the outcome of the negotiations. As Marcia Scott credibly testified, Jones told her group that "the union couldn't guarantee that we wouldn't lose our bonus, that it would all be decided through negotiations." As put by Dale Haney, Jones, after referring to the Company's hospitalization and sick benefits and its bonus plan, said to his group that it had been rumored by "some people", obviously alluding to supporters of the Union, that the rentention of present benefits was assured. This was not true, said Jones, "It would all depend on what the negotiation committee had to say about it." In other words, as Jones stated to the group, "There wasn't any guarantee about still keeping those benefits." As reported by Henry Anstaett, Jones said to his group that "if the Union got in we wouldn't have any more vacations and insurance would be discontinued." Jones testified that he read all of the speeches, "with the exception of one which was read in part and there was a question and answer session," and that he did interpolate somewhat to explain why he was reading the speech instead of speaking "off-the-cuff." Jones was not questioned concerning the testimony of Marcia Scott, Dale

Haney and Henry Anstaett, quoted above. I conclude upon all of the testimony that Jones interpolated in his speeches to a greater extent than his testimony indicates and that Jones warned at least one group that adherence to the Union might result in the loss of present benefits, depending on how the negotiations proceeded.

About this same time, Lee Drumwright, the supervisor in the hassocks and accessories department, approached Dewey Herron at his work station in the department and asked him how he felt about the Union. When Herron spoke up in favor of the Union, Drumwright according to Herron's uncontradicted testimony,[4] admonished him to "make sure that [it] could help before [he] went one way or another." A few days later Drumwright asked Cecil Nichols, another of the employees in his department, whether he was going to attend the first union meeting which had been scheduled for that evening. The next morning, after the meeting had been held, Drumwright questioned Nichols as to whether he had attended. Nichols admitted that he had. Drumwright also made the same inquiry of Larry Noble the morning after the first union meeting. When Noble answered that he had attended the union meeting, Drumwright asked whether Noble had signed a union card. Noble told Drumwright that "it was none of his damn business."

2. The first union meeting on January 12

As indicated above, the first union meeting for the Company's employees was held on the evening of January 12, 1965, at the Ranch House Motel in Emporia. About 75 employees attended. Edward J.

[4] Drumwright was not called as a witness. Consequently all of these conversations attributed to Drumwright stand undenied in the record.

Bonitt, a national representative of the Union, and Patrick, a national representative of the AFL-CIO, both spoke to the employees at this meeting. The testimony concerning the statements of Bonitt and Patrick at this meeting is somewhat conflicting. Set forth immediately below are the facts as I find them after resolving the various conflicts in the testimony. The basis for my resolution of the conflicting testimony is explained below in connection with my discussion of the Company's contentions.

Bonitt, who spoke first, gave a brief history of the Union, stated the nature of the relationship of the Locals to the national organization, mentioned the Union's pension, hospitalization and insurance plans and various other benefits to be derived from membership in the Union, and pointed out that if they wanted a union, the first step would be to sign a card. Bonitt added that it was to the employees' advantage to have a substantial majority signed up, because then they would be in a stronger bargaining position in the negotiations.

Patrick announced that the Union would ask for volunteers to assist in the drive, and stated that it was up to the employees to get the authorization cards signed up and that they should do so as soon as possible. Patrick said that he wanted to get cards signed by 65 percent of the employees before he approached the Company. He explained that after this was done the Union would request recognition as bargaining agent. Patrick went on to say that if the Company was agreeable, they would call in some disinterested outside party to check the cards, and that the Company would not find out who signed. Patrick commented, however, that as a rule employers did not agree to grant recognition on the basis of a card check

and that generally the Union had to go to an election. Patrick further explained as follows:

> . . . an election is a pretty much complicated problem from the standpoint that first we have to get at least 30 per cent of the people signed before the government will have an election. Then the government would send an agent in when we send the cards to the government and try to set up an election. This was a secret ballot election, that no one would know how they voted, not even the union, the company, nor any of the supervisors nor any of their fellow employees. That the individual, himself, and his own God would know how he voted at the election. There would be no problem that way whatsoever.

Patrick continued that after the election, if the Union won, the employees would nominate a negotiating committee and both the Company and the Union would have to bargain collectively in good faith. Patrick further stated that while he could not promise anything definite, the chances were that as a result of the bargaining the employees' benefits would be increased and that they would not lose any of their present benefits, although they might receive them in a different form.

After reading a membership application card to the employees, Patrick passed them out, together with postage-free return envelopes, and explained that if they wanted to think about the matter further, or talk it over with their families, they could do so and mail the cards back to his office later. Patrick informed the employees about their rights under the Act and the work of the Board in protecting these rights, and asked the employees to be on the alert for violations of their rights.

During the course of the general meeting questions were asked from the floor. Among others, questions were asked concerning the benefits which would be sought through the Union. A considerable discussion of piecework rates ensued. In answering questions Patrick assumed that the Company was going to insist upon an election and consequently made frequent references to the election. These references to the election which Patrick anticipated would be held and his explanation that in the election, no one would know how he voted, neither the Union, the Company, nor their fellow employees would know, I find, were interpreted by some of the employees at the meeting as indicating that the cards would be used only for the purpose of obtaining an election. There is much testimony concerning whether Patrick did or did not make such statements at this meeting. As indicated above, the basis for my resolution of this conflicting testimony is discussed below.

After the meeting with the group of employees as a whole ended, Patrick and Bonitt met with a smaller group of volunteers who were to act as the organizing committee. Patrick informed them that it was their responsibility as committee members to get the cards signed, and again stressed that it was important to get 65 percent of the employees signed up because of the strong likelihood that the Company would refuse recognition, and the Union would have to go to an election. Patrick gave the committee members cards and instructed them not to solicit signatures on cards on company time. Finally, Patrick warned the committee members to be on the lookout for antiunion

conduct on the part of the Company's supervisors or managers, and told them to keep notes regarding any threats, instances of questioning, or discharges.

In a question-and-answer session at this committee meeting, one question was asked of Patrick the answer to which is the subject of much conflicting testimony. After considering all of the pertinent evidence I conclude that the question was raised whether the language on the cards meant that the signers were then joining the Union. Patrick answered, I find, that the cards would be used first to obtain an election, that the signers of the cards would not be joining the Union at this time, that this would be deferred until after the Union had won the election and had succeeded in negotiating a contract satisfactory to the employees.[5] As explained more fully below, this finding is based not only on the testimony of union representatives Patrick and Bonitt, but also on the testimony of witnesses called by the Company, Laura Jordan and Sandra Fraser (Soendker), and upon my appraisal of all the attendant circumstances.

3. The Union signs up a majority of the employees and requests recognition; the Company refuses

Approximately 10 employees signed cards at the meeting on January 12. During the next few days signatures on cards were obtained from a substantial majority of the Company's employees. By January 18 the Union had received over 100 signed cards. There were about 172 employees on the Respondent's payroll at this time.

[5] I base my finding that this question was asked at the meeting of the organizing committee and not at the general meeting on the fact that only members of the organizing committee gave testimony about such a question being asked.

On January 18 Patrick mailed the following letter to the Company:

CRAWFORD MANUFACTURING CO.
Emporia, Kansas.
(Attention: Mr. Jones)

GENTLEMEN: This will inform you that a majority of the employees of your establishment in a unit consisting of all Production Workers, Shipping & Receiving and Maintenance Employees, which the National Labor Relations Board normally considers appropriate for collective bargaining, has designated the Amalgamated Clothing Workers of America, AFL–CIO, to act as their collective bargaining representative.

We request an opportunity to prove majority representation in this unit by a card check through a disinterested party, agreeable to both union and management who will not reveal the identity of the signatories.

We request you furnish us with a list of job classifications and wage rates paid employees at your establishment. We request, further, that an early conference be arranged for discussion on the above mentioned items and for the purpose of negotiating a contract for your employees.

We further request equal time and opportunity at any meetings, discussions, use of bulletin boards, showing of film, or any other method you may use for discussing the matter of union representation with your employees.

It would be greatly appreciated if, by return mail, you notify us in regard to the date, time and place that will be convenient for the above

requested conference for discussion of recognition and contract negotiation.

Very truly yours,

/s/ Jay Dee Patrick
JAY DEE PATRICK,
National Rep., AFL-CIO.

cc: Ed Bonnitt
Bill Hall
N.L.R.B.

The Company replied by letter dated January 20, as follows:

DEAR MR. PATRICK: The matters which you raise in your letter of January 18, should be processed through the National Labor Relations Board.

We would suggest your compliance with these procedures.

Yours truly,

/s/ Linwood Jones
LINWOOD JONES.

4. The Company begins its written campaign against the Union

On January 18, the same day the Union mailed its letter to the Company requesting recognition but before it was received by it, the Company mailed the following letter to all of its employees at their homes:

CRAWFORD MANUFACTURING COMPANY, INC.
Emporia, Kansas, January 18, 1965.

To Our Employees:

I am writing this to you at your homes because it is a matter of importance to all of us and it is something which affects *your very livelihood.*

Several outsiders have asked you to join their union, and in return for monthly dues paid to them, have made wild promises—promises that they cannot keep. It is the company that pays the wages—not the Unions. As we have said

before, the company cannot and will not pay wages that puts them in a non-competitive position.

Our company started its business in Emporia in 1959. We lost a great deal of money in starting this business and we have never made what we consider a satisfactory profit. Nevertheless, when we have done better, you have done better. Only this past year we added an extra paid holiday and free surgical insurance for you and your dependents. *No Union made us do this.*

Here are some of the benefits you now enjoy which many union contracts do not contain:

1. Sick Pay. You are paid your basic wage after a three-day waiting period when you are out sick for any reason even if you are hurt in an auto accident on a Sunday.
2. Two Weeks Paid Vacation after one year of service.
3. Free Hospitalization and Surgical Insurance for you and your dependents at no cost to you. (Surgical insurance was just added this past October.)
4. Free Life Insurance—$500.00 for female employees and $1,000.00 for male employees.
5. Seven paid Holidays. (D[illegible] after Thanksgiving was just added last November).
6. Profit Sharing Bonus. Something very unusual for a small company of our size.
7. Pension Plan after 5 years of service. Paid for by your company—no cost to you.

No Union made us do these things. This is a large cost to your company.

Our profit sharing plan in particular is very unusual for *any* company to have. Last September checks ranging from $50.00 to $259.00 were given to our eligible employees. To the best of our knowledge this union who is now so "inter-

ested" in you does not have a contract with any company that pays its members a part of company profits.

These outsiders have promised that all of the benefits we now give will be continued. This is a false promise. What you might be able to get depends upon negotiations. Nothing you have now is assured. Any negotiations may result in less than what you have now. The only weapon a Union has is a strike. No one gains by losing their wages during a strike. Car payments, house payments and food bills continue but wages do not. Unemployment compensation is *not* paid to employees on strike. The Union outsiders are paid—but you are not.

I want to keep telling you the truth so you won't be misinformed by these outsiders. These are the facts, don't let anyone tell you otherwise. Think twice before signing anything. If you have already signed a card, you may ask for it back.

We appreciate your loyalty and cooperation over the past years and we hope you will have the same confidence in us in the future.

Yours truly,

LINWOOD JONES.

The next day the Company gave out the following release to all of its employees:

JANUARY 19, 1965.

To Our Employees:

A union has been trying to organize our good workers. It has made wild promises—promises that it cannot keep. It is the Company that pays the wages—not the union. The Company cannot and will not pay wages that puts them in a non-competitive position. This is not good for us and it is not good for you. If you vote for a union and they insist on more, the only thing they could try to do is strike. A strike means lost wages for you—wages that you can *never recover.*

These outsiders have promised that all the benefits we now provide will be continued. That is also a false promise. What you might be able to get depends upon negotiations. Nothing you have now is assured. Any negotiation may result in less than what you have now. Don't let anybody tell you otherwise. Think twice before signing any thing. If you have already signed a card, ask for it back before it is too late.

Yours truly,

L. JONES.

Later that day, January 19, the Company issued a second release purportedly clarifying its earlier release. It reads as follows:

CRAWFORD MANUFACTURING COMPANY, INC.
EMPORIA, KANSAS

JANUARY 19, 1965.

To Our Employees:

On withdrawal of your Union cards, you are entitled to request the withdrawal of your cards if you want to. That is entirely up to you.

Whether you do or whether you don't will not affect you or your job at this plant. We believe that in our last time card slip to you with reference to withdrawing of cards, that we did not make this as clear as we should have. This notice correctly sets forth our position in this matter.

Remember, the law says you are free to join or not to join a Union and no one can restrain or coerce you in the exercise of your rights. The company will abide by the law. If any of you are intimidated or threatened by the Union, please let us know at once.

Yours truly,

LINWOOD JONES.

5. The second union meeting on January 19

The Union had its second meeting on the evening of January 19. Approximately 72 employees attended. Patrick informed the employees that, having obtained sufficient authorization cards, the Union had written the Company a letter demanding recognition, and that it had filed with the Board a petition in case the Company did not grant the Union's request for recognition. Patrick read to the assembled employees the Union's letter demanding recognition.

Patrick had with him at the meeting one of the slips which the Company had given the employees that day in which it had suggested the withdrawal of the union authorization cards. He announced that any employee who wanted to withdraw his card was free to do so, and offered to assist anyone desiring to withdraw in obtaining his card back from the Board's Regional Office in Kansas City, to which they had been mailed along with the Union's petition.

As indicated above, during this meeting questions were asked of Patrick by various employees. One question related to what he thought General Manager Jones' response would be to the Union's request for recognition. Patrick replied that "the chances were he would not, that 99 times out of 100 we had to go through a hearing and to through [the NLRB election] procedure." Patrick again explained this procedure to the employees, as some of those present had not attended the first union meeting. The question was again asked whether the signers of the cards had to join the Union. Patrick answered, as he had at the meeting of the organizing committee a week earlier, that the cards would be used to obtain an election, that the employees signing cards would not be joining the Union at this time, that only after the Union won

the election and succeeded in negotiating a contract acceptable to the employees would the signers of the cards be joining the Union.

6. The Company distributes further antiunion literature among the employees

On February 5, the Company issued a release notifying the employees of the scheduling on February 18 of an NLRB hearing on the Union's petition for an election and certification. The postscript to this release is as follows:

> Remember a while back, I said to beware of the loose talk and reckless promises of these outsiders? They really came up with a "whopper" in their last hand-out, knowing full well that the "8 Bucks A Week" was nothing more than a come-on to get you to bite at their bait. These outsiders underestimate your intelligence.
>
> Promises such as these lead to strikes!

This was the Company's reply to a portion of a Union leaflet passed out on February 3 in which it was argued that only the "boss" profits by delay in representation matters. This portion is as follows:

> The boss doesn't feel that way. . . . Let's say that when your union is voted in you negotiate wages and other benefits totalling 20 cents per hour. At forty hours a week that amounts to eight bucks a week. Multiply that eight bucks times the number of workers and you can see how much the company saves each week it delays the election.

This union leaflet was one of about 17 distributed by the Union after it had obtained authorization cards from a substantial majority of the Company's employees. Apparently they were designed to stimulate continued interest in the Union. With a few ex-

ceptions, all of the leaflets passed out were standard AFL–CIO leaflets which were designed for use in election campaigns in general and were not geared to this particular campaign. Unlike the union propaganda used in some election campaigns, this literature spoke in generalities and contained no personal attacks on the Company or its officials.

The Company's next communication to the employees was put out on February 15. It is as follows:

CRAWFORD MANUFACTURING COMPANY, INC.,
Emporia, Kansas, February 15, 1965.

Q. Does it cost money to belong to the Union?

A. Yes, it costs *plenty*. Unions collect monthly dues and initiation fees. Besides that, there are a lot of other fees such as assessments and contributions. Unions also *fine* members who violate any of the many Union rules.

Q. Does any employee of the Crawford Manufacturing Company have to join the Union?

A. No. You don't have to belong to the Union to keep your job here and don't let *anyone* tell you that you do. The Union did not start this Company and does not operate this Company, nor has the Union ever given you a job or paid your wages, and the Union never will.

7. General Manager Jones' warnings to the members of the Union organizing committee

In the meantime, the Union, on February 8, had mailed a letter to the Company notifying it of the names of its committee members and asking it to respect their rights under the National Labor Relations Act.

The same day the Company received this letter, or the next day, each of the committee members was

summoned away from his work by William Jenks, the plant superintendent, and directed to go to General Manager Jones' office. There each committee member was interviewed individually by Jones, who told each employee that he had received the Union's letter about the organizing committee, and that he wanted each to know that he was not entitled to any special status because of being a committee member and that "any outside activities that interfered with our work would call for dismissal."

Subsequently Susan Blount, one of the committee members thus spoken to by General Manager Jones, went up to Superintendent Jenks and asked whether her job was in danger because of being on the union organizing committee. Jenks stated that her job was safe as long as she did her work.

8. Supervisor Drumwright's further antiunion activities

A few days after Jones' warnings to the members of the organizing committee, Supervisor Drumwright approached Richard Solis, a member of the committee, at his work in the department. In the course of the conversation which ensued, Drumwright remarked, according to Solis, "that anyone on the organizing committee might as well think about finding another job because we would probably be let go after the election for a union."

About this same time Supervisor Drumwright spoke for about a half hour about the Union to Charles Speer, one of the employees in his department. Drumwright mentioned the dues and assessments in the Union and raised the question with Speer as to whether the Union could get anything for the employees that they could not get without it. Subsequently Drumwright questioned Carl Cunningham,

John Joss and Harold Posey either as to how they felt about the Union or how they were going to vote in the election. Posey told Drumwright that he "didn't think too much of it." Of Posey, Drumwright also inquired as to how he felt that Bill Sealy would vote in the election.

9. The Company agrees to the holding of a consent election; General Manager Jones' neutrality talk; the layoffs .

As indicated above, on February 18, at the hearing on the Union's petition, the Company agreed to the holding of a consent election, which was set for March 26. It was also agreed that employees on the February 12 payroll would be eligible to vote in the election.

The next day General Manager Jones made a brief talk to a group of employees in which he stated as follows:

> I, as manager of this company, am the man speaking for this company. Any rumors or threats that you may have heard which was attributed to any of our supervisors is not company policy. We don't know what has been said but it is our policy to refrain from making any threats or promises or interrogation. We repudiate any that have been made. If any threats or promises have been made to you let us hear about them; we don't tolerate this.

Late in the day on February 19, the Company notified eight of its employees of their temporary layoff. These cases are discussed below.

10. More antiunion communications

With the election now set for a definite date, the Company in its antiunion communications to the employees stressed the importance of voting "No" in

the election. On February 26 the Company issued the following leaflet:

CRAWFORD MANUFACTURING
COMPANY, INC.,
Emporia, Kansas, February 26, 1965.

Q. Can an employee of the Crawford Manufacturing Company who signed a Union card vote against the Union in the election?

A. YES, you can vote against the Union. It doesn't make any difference whether you signed a Union card or went to Union meetings. The election will be your opportunity to vote in freedom and by secret ballot and you can vote as you wish.

Q. Should you vote in the election if you are not interested in the Union?

A. YES. It is very important that everyone votes. The Union does not have to get a majority of the employees eligible to vote, but only has to get a majority of those actually voting. Do not stand back and let others decide your fate. This election may be the most important one you will ever have a chance to vote in. Be sure and vote!

Q. If the Union should win the election, will the employees of the Crawford Manufacturing Company have to go out on strike?

A. The only way that the Union can try to force the Company to agree to what the Union has been promising is to make you go out on a strike. Promises are cheap but it is something else for the Union to fulfill those promises.

On March 9, the Company put out a letter purportedly answering the "UNION CLAIM" that "the employees have 'nothing to lose' because the Company cannot 'take away' from what the employees now have; it can only 'give' more." There is nothing in the leaflets distributed by the Union during the entire organizing campaign making any such claim. Appar-

ently the basis for the Company's repeatedly attributing to the Union such a claim is the fact that Patrick at the first or second union meeting made a remark about present benefits being guaranteed in one form or another.

In the March 9 letter the Respondent stated with respect to the above quoted purported claim of the Union, as follows:

> "Such a statement by the Union is false. Under the law, if the Union is selected as the bargaining agent, both sides (the Union and the Employer) make proposals. All that is required is that the parties thereafter try to reach an agreement in good faith. The agreement which is reached may be better than or may be less than what the employees now have. The law does not require the making of any concessions by either side.

In support of its assertion that the Union had falsely claimed that benefits could not be reduced as a result of bargaining negotiations, the Company cited and quoted from an Annual Report of the Board and several Court and Board decisions.

11. Superintendent Jenks' conversations with employees about the Union

Shortly after the distribution of this document among the employees Superintendent Jenks summoned two of the members of the organizing committee to his office and, in the course of lengthy conversations, sought to bring home to them individually the possibility of their losing present benefits if the Union was successful in the election. One of these was Nancy Brown, to whom Jenks had previously remarked that he was shocked to find her among the committee mem-

bers.[6] Observing her passing his office, Jenks called Brown in. This was the second or third discussion which Jenks had had with Brown on the subject of the Union.[7] On this occasion Jenks showed Brown a large page of reprints of articles and photographs from the Chillicothe Constitution-Tribune dealing with a strike in which the Union was currently engaged at the Boss Manufacturing Company plant at Chillicothe, Missouri. The articles and pictures portrayed considerable violence in connection with the strike. Brown told Jenks that she also deplored violence. Jenks brought up the fact that Joseph Bechtel had brought in a little book put out by the Board in order to prove to Jenks "that you don't start out from scratch" in bargaining negotiations. However, Jenks asserted that Bechtel "couldn't prove that out of that book." Pointing to a blank yellow tablet in front of him, Jenks declared that "it would be just like starting from that, you—there is no guarantee that they can't take things away from you, things you have, and replace them with something else, your seniority, they can switch that around."[8]

Jenks next talked with Larry Noble. The meeting was arranged by Supervisor Drumwright at Noble's request after Jenks earlier that day had impliedly threatened to discharge Noble. At least this was Noble's view of the matter. This earlier incident is

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[6] Jenks denied telling Brown in so many words that he was "shocked" to see her name on the union list. Whether Jenks used this word or not, I believe that he conveyed this impression to Brown when he spoke to her on this occasion.

[7] Jenks admitted talking to Brown for 75 minutes on one occasion and 70 minutes another time.

[8] The foregoing finding is based on Brown's credited testimony. Jenks was not questioned about Brown's testimony regarding negotiations starting from scratch. The remainder of Brown's testimony is corroborated by that of Jenks.

discussed below. After discussing Company matters at the outset, Jenks stated as follows: "Larry, I believe I am wasting my time talking to you because you have shown your feelings to the union by being on the organizing [committee], but I feel obligated." Jenks went on to say "that he had seen union contracts from other plants and that they didn't have near as much as we had and that the Union told us we negotiated from what we already had and we couldn't lose anything." Jenks continued, ". . . during negotiations, both sides would sit down with a blank sheet of paper and they would negotiate from there . . . ."[9] Jenks then mentioned the Boss Manufacturing Company strike at Chillicothe, which he described as a foul mess because of all the violence which occurred there. This conversation occurred on March 16, 10 days before the election.

The incident which led Noble to seek to talk to Jenks occurred under these circumstances. The Company had posted on the bulletin board a leaflet containing language to the following effect: "Stand Pat, You Have a Deal Without Paying Union Dues." The leaflet had been altered to read, "Stand Pat with the Union" or words to this effect. About 9 a.m. on March 16, Jenks summoned Noble to the bulletin board, saying that he wanted to show him something. Jenks then said that "he didn't know who the clown

[9] Jenks denied saying anything about negotiating from a blank sheet of paper. Jenks' version of this part of the conversation is as follows: "He [Noble] asked me what benefits would we retain, he felt we had a better hospital and sick pay plan than the union did and he would like to keep that in if it came to a contract. I explained to him that all of this would be done entirely on a negotiation and that it was hard to say what would be retained and what would be swapped, this would all be done by professionals." In my opinion Noble's version quoted in the text above is more credible.

was that altered the leaflet, but if he found out, he was going to run [him] out the door." Then, looking at Noble, Jenks said, "You understand." After thinking the matter over, Noble became concerned that Jenks thought that he (Noble) had altered the leaflet. When Supervisor Drumwright later passed through the department, Noble mentioned the incident to him. As a result, the interview with Jenks was arranged.[10]

Another similar incident involving Jenks and a member of the organizing committee occurred about this same time. On this occasion, as Marcia Scott was working at the inspection table, Jenks came up, accompanied by Harry Hollinger, Scott's immediate supervisor. Jenks stated that he had heard that she had said that the Union had Jenks and Jones "scared", and also that she "was pushing the union on company time." Jenks added that he had two people who would sign statements to the effect that she had been pushing the Union on company time. When Scott denied having done so, Jenks let the matter drop. About a week later Scott approached Jenks and told him she really had not said that the Union had him and Jones scared, and that there had been a misunderstanding. Jenks rejoined that he had people who would sign statements to this effect and that "he could have fired [Scott] and that was the way things was." After further conversation, Jenks stated that "he could have fired [Scott]" even if the persons signing statements were lying.[11]

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[10] Jenks, although recalling an incident involving Noble and a "mutilated" card, denied saying anything about a "clown" or running anyone out. I believe Noble's version.

[11] The foregoing finding is based on Marcia Scott's credited testimony which is not denied by Jenks. In fact Jenks' testimony, for the most part, gibes with Scott's testimony about these incidents.

In this period, a week or two before the election, Jenks also had a conversation with Mary Clements at her work station. Jenks told Clements that he "thought that [she] had heard enough about this union back and forth both ways and that he couldn't ask [her] which way [she] intended to vote, or wouldn't, but he hoped that he had [her] support, said if [she] ever had any complaints or questions to come to him and let him know and he was sure we could work it out and that was about it." Later that day Clements was assigned to do some hand-stuffing of pillows in place of another girl who was on a leave of absence. Usually Clements worked on a machine stuffer at piece-work rates and she was able to earn more money on her regular job than on the temporary assignment. Clements decided to accept Jenks' invitation to take her complaints to him. Consequently she went to Jenks' office and complained to him that she could not make her average pay doing hand-stuffing. Jenk replied that this was a legitimate request and that she should receive her average pay for the hand-stuffing work which she was doing. Jenks then called Hollinger, Clements' supervisor, and informed him, in Clements' presence, that he had talked to Clements earlier that day and that "he felt they had [Clements'] support and he in turn had to give . . . . his to [her]." Jenks explained to Hollinger the nature of Clements' complaint and asked that it be taken care of. Hollinger then went to Clements' table and instructed her how to make out her time sheet so that she would receive pay equivalent to the average which she had made on her machine.

Jenks had discussions with other employees during the preelection period in which he presented arguments against the Union. Among those to whom he spoke were Committee Member Dewey Herron and also Robert Bastin.

12. The Company continues the dissemination of antiunion literature

The Company's next move was the release to the employees on March 18 of a photocopy reproduction of a union dues checkoff authorization card together with certain comments. These were not the cards which were used in the Union's membership drive. Regarding these checkoff calls the company commented as follows:

> If a majority of our employees vote for an outside union, here is a sample of the check-off form you may be asked to sign.
>
> Check-off means that the *dues* and *assessments* of this union may be deducted from your pay check before you even see it!
>
> You will see from the below that if you sign this form you cannot withdraw it for a period of at least one year or until the contract expires.

This document, which concludes with "VOTE *NO* ON MARCH 26TH," does not mention the fact that the checkoff can be put into effect only if the Union requests such a provision in the contract and the Company itself agrees to such a provision.

Later, the Company put out the following document:

CRAWFORD MANUFACTURING CO., INC.,
Emporia, Kansas, March 18, 1965.

Re: UNION.

Here is another cheap trick that the Union has done to try to mislead our employees. This is a typical union tactic!

Here is a telegram just received at 4:00 P.M. from the Union:

CRAWFORD MFG. CO. *Deliver Thursday Around 4 P.M.*

Mr. JONES, Plant Manager and Mr. JENKS, Personnel Manager

Emporia, Kansas.

We urgently request a debate between the management and the union be held in order that the employees of your plant can determine intelligently the actual truth of the organizational campaign now being conducted in your plant by the Amalgamated Clothing Workers Union. We request that this debate be open to your employees, supervisors and their families. We the union will accept any moderator you so choose. We the union will be ready to debate at any time or place you so choose. Reply respectfully requested. Wire reply to AFL–CIO Building. 2001 Empire, Joplin, Mo.

JAY DEE PATRICK,
National Representative AFL–CIO, Coise Wiggins International Rep., Amalgamated Clothing Workers Union.

Here is the company reply:

JAY DEE PATRICK, *National Representative.*

Your propaganda telegram won't work. This is a move of desperation on your part because you know our employees will reject your union, its strikes, violence, dues and other penalties which you would impose on our employees. We have given our employees the facts and we propose to continue to give them the facts.

You are fully aware of the fact that the law prohibits the Company in what it can say to the employees while you can continue to make wild promises and statements that you know cannot be kept. I trust that you will give our reply the same publicity that you intended to do with your telegram.

LINWOOD JONES.

We will continue to give you, our employees, the facts. We are sure you can see through this

latest union maneuver. We want to give you the facts so that you can make an intelligent decision and we feel that you will vote *NO* in the election after careful consideration.

Yours truly,

LINWOOD JONES.

LJ:nse

P.S.—Why did the union not want this telegram delivered until after 4:00 P.M. this afternoon? We are here all day!

The next day, March 19, which was payday, the Company paid the employees for their week's work in two paychecks. The Company explained its action in the following slip which was enclosed with the two paychecks:

CRAWFORD MANUFACTURING COMPANY, INC.,
Emporia, Kansas, March 19, 1965.

UNION DUES:

An outside union has been trying for about two months to get you to vote for their union and become a dues paying member.

From your regular pay-check this week we have deducted two months dues to alert you as to how much money this really is. This amounts to *$45.00 per year.*

Attached is a separate check to reimburse you for the amount deducted.

Vote *NO* on March 26th

That same day the Company placed on the various machines in the plant 3"x5" cards picturing a man with empty pockets and bearing the following text: "Have you figured what you'll have left after union fees, dues and special assessments." Apparently about this same time the Company distributed a printed dodger stressing how costly strikes were to employees even though they won the strike.

On March 22 the Company issued a release to the employees in which it quoted from the constitution of the Union. Relying on one of the quotations, the Company asserted, "YOU CAN BE FORCED TO STRIKE EVEN THOUGH *YOU* DON'T WANT TO." Another provision, according to the Company, subjects employees to charges filed by other employees, and then the Company went on to say, "THIS POSSIBLY CAN BE DONE EVEN BECAUSE SOMEONE DOESN'T LIKE WHAT YOU DO." This particular release, after discussing various other asserted disadvantages flowing from the union's constitution, concluding as follows:

> THESE ARE THE SHOCKING FACTS: THESE ARE THE FACTS THAT THE UNION WILL NOT TELL YOU ABOUT. IT'S NO WONDER THAT UNION MEMBERSHIP HAS DECLINED!
>
> IF YOU *DON'T* WANT OTHER PEOPLE TO CONTROL YOUR LIVELIHOOD . . . IF YOU *DON'T* WANT OTHER PEOPLE TO DECIDE THAT YOU SHOULD STRIKE REGARDLESS OF YOUR OWN WISHES—
>
> THEN
> VOTE *NO* AGAINST THE UNION

On March 23, 3 days before the election the Company mailed to each of the employees at their homes personal letters which were signed by Linwood Jones, the Respondent's general manager. The text of the letters follows:

> On Friday you will be called upon to make one of the most important decisions of your life. I am sure that by now you have heard many conflicting stories, statements and promises. Because this decision is so important to you, I would like to take this opportunity to briefly outline the facts.

A Union can promise many things, but only the company can perform. The only guarantee a Union can make is of the *right to strike.* This can mean many weeks *without a pay check,* while your cost of living continues to run.

If you elect to join an outsider's union, you obligate yourself to pay *monthly dues, assessments, fines* and *penalties,* as determined by the Union outsiders—not by you! There is a minimum cost of $45.00 per year to you for "Pie In The Sky Promises." This will amount to approximately $8,000.00 per year from our employees.

On the other hand, the company has provided you with steady work, liberal fringe benefits including *holidays, vacations, sick pay, life insurance, hospitalization,* and *pension plan* and many others at no cost to you. These are tangible things which have been obtained without a day's lost wages because of strikes or work stoppages.

They have been voluntarily given because you are an excellent group of employees. You have not been required to pay tribute to any union boss to obtain them.

We all know *the only way we can prosper is by working together.*

You have had a taste of the bickering and dissension and petty harassment engaged in by a few. Think what it could be like if this small group succeeds in selling this union bill of goods! Let's put a stop to this by voting *NO* and sending these paid organizers back where they came from. Nothing you have signed up until now or no meeting you have attended obligates you to vote one way or the other on Friday. This is a decision which you should make based on your own self-interests.

Remember that regardless of what the Union has told you, if a majority of our employees vote for these outsiders, you are stuck with them

for at least *one year*. Nothing can change this, not the Union, not the company, no one!

I want to thank you for your fine cooperation and loyal service in the past. If you vote *NO* in the election Friday, you may be sure it will be greatly appreciated by your company and fellow employees.

The day before the election, March 25, the Company issued the last of its preelection releases. Attached to it was a copy of its March 9 release attacking as false the Union's asserted "claim" that the employees could not lose present benefits in the course of bargaining negotiations. The covering release is as follows:

CRAWFORD MANUFACTURING COMPANY, INC.,
Emporia, Kansas, March 25, 1965.

Re: *LAST-MINUTE UNION TRICKS:*

Beware of last-minute union promises and double-talk. Judging by their past performances, they will undoubtedly try to sell you a "Bill of Goods" and "Promises of Pie In The Sky." This a typical last-minute act of desperation. Here is what they will probably tell you:

1. If you will only vote for our union and pay us dues, every benefit you now have is assured to you by law, and also there is a "pot of gold at the end of the rainbow." I am attaching another copy of the law which was given you sometime ago in regard to what can and cannot be done during contract negotiations. The law is that what is included in any contract must be negotiated and that *can mean less than you now have.*

2. They probably will tell you that only you, the people can strike and that if you will only vote for them and pay their dues, you can never be made to strike and lose your wages against your wishes.

Let's look at the facts! See Article V, Section

4 of the by-laws of the Kansas City Joint Board. This states that *someone else decides whether you strike.*

Now let's look at the record. This union has a record of strikes and violence. This same union has been conducting a strike in Chillicothe, Missouri since January 7 against the employees' wishes. Apparently these people did not want to strike and would like to return to work, but they are being intimidated, threatened, and harrassed by union leaders in order to keep them away from their jobs.

Does this sounds like freedom? The same thing could happen here if a few of these union agitators get control.

Some of our people who originally believed these false promises have now expressed publicly their complete dis-belief after investigating and finding out the true facts.

We are glad of this. It is easy to get in but awfully hard to get out.

/s/ L. Jones
LINWOOD JONES.

VOTE FOR YOURSELF—VOTE *NO*!

The Company had previously circulated among some of the employees clippings from the Chillicothe Constitution-Tribune stressing violence encountered at the Chillicothe, Missouri, plant of the Bess Manufacturing Company in the course of a strike in which the Union was involved.

The Union replied to the leaflets issued in the past few days by the Company with a leaflet of its own which it passed out on the morning of the election. This leaflet stated, in part, as follows:

1. ONLY *YOU* AND *YOU ALONE* CAN DECIDE WHETHER YOUR PLANT WILL GO OUT ON STRIKE.
2. Union dues are $3.75 per month.
3. Initiation fee is $1.00.

4. There has *NEVER BEEN* an assessment in our union in this area.

This was one of the few leaflets distributed by the Union during the campaign which was prepared for use in the particular situation existing at the plant.

13. The election; subsequent events

The election was held as scheduled on March 26. As indicated above, the Union lost, 69 to 86 with 8 challenged ballots.

As soon as the election was over, the Respondent distributed the following announcement among the employees:

CRAWFORD MANUFACTURING
COMPANY, INC.,
Emporia, Kansas, March 26, 1965.

ELECTION RESULTS

I am sure that all you know by now that the election results were 85 to 69 against the union.

We knew that once you had the facts you would make a sound decision. You did so and you are to be congratulated!

We also appreciate the confidence which you have shown in your company. Now as before we want to make Crawford Manufacturing Company one of the best places to work in this area.

I personally want to thank each and every one of you for your loyal support

Yours truly,

LINWOOD JONES.

LJ:nse

About 4 p.m. on the afternoon of the election the Company suddenly discharged Mildred Jarvis. Her case is discussed below.

At 4:30 p.m. that afternoon, the Union distributed its final leaflet giving its thanks to those who voted

for the Union, saying "no hard feelings" to those who did not, and expressing the hope that in the future the Union's strength in the plant would grow.

On the Monday after the election Superintendent Jenks summoned Harold Posey to his office. Posey is the employee, it will be recalled, who told Supervisor Drumwright that he "didn't think too much" of the Union. Jenks, after informing Posey that his new supervisor, Doudican, had informed him that Posey "was unhappy with the result of the union election," told Posey that he was "disappointed" in him for "talking out of both sides of his mouth."[12]

C. The layoffs and discharges

1. The layoffs of February 19

a. The basic facts

Near the end of the workday on Friday, February 19, the day after signing the consent election agreement, the Company laid off eight employees from various departments. The Company notified the employees that they were being laid off for lack of work, that they were being laid off on a seniority basis, and that they would be recalled as soon as possible. Set forth below are the basic facts concerning the employees laid off:

[12] This conversation throws light on the question of the Company's knowledge of the union sympathies of its employees at the time of the layoff on February 19 and is included for this purpose (Posey who was not laid off, had the same seniority as Dennis Mendoza, a known organizing committee member, who was included in the layoff).

Name	Hired	Department	Operation
Dennis Mendoza	10-14-64	Hassocks and Accessories	Boxer.
Gary Wensuc	10-20-64	Hassocks and Accessories	Tufter.
John Siebuhr	10-21-64	Hassocks and Accessories	Tufter.
Dale Haney	10-15-64	Wire Cushion	Boxer.
Royal Defoor	10-23-64	Welt	Slitter.
James Hayes	10-15-64	Marine	Cutter.
Bibiano Sanchez	2- 9-65	Marine and Seat Covers	Janitor.
Wayne Stockebrand, (Part-time)	1962	Utility man throughout the plant.	

The above-named seven full time employees, all having been hired on or after October 14, 1964, had the lowest plantwide seniority of all the Company's employees. One other hassocks and accessories department employee, Harold Posey, who was also hired on October 14, 1964, was not laid off. Although both Posey and Mendoza were not performing precisely the same operation in the department at the time of the layoff, they were both carried on the Company's seniority list as boxers in the hassocks and accessories department. In addition, as indicated above, the Company also laid off Wayne Stockebrand on February 19. Stockebrand had worked for the Company part time since 1962 while attending college. At the time of his layoff Stockebrand was boxing marine items. Stockebrand was normally transferred from operation to operation, wherever an employee was needed to fill in.

No male employees were hired during the period of the layoffs. Eight female employees were hired during the period of the layoff and four female employees either quit or were terminated during this period. None of the female employees hired was assigned to operations customarily performed by men.

Shortly after the Union lost the election on Friday, March 26, the Company decided to recall the laid off employees (with the exception of Bibiano Sanchez whose case is discussed below). The Company did make offers of reinstatement to all the laid off employees except Sanchez. These offers were not neces-

sarily to their former or substantially equivalent jobs. Mendoza returned to work on the following Monday, March 29, and Siebuhr on the following Wednesday. Defoor returned on April 5. The other laid off employees failed to return. In Wensuc's case, his failure to return was due to his having entered Military Service.

b. *The Company's knowledge of the union sympathies of the men laid off*

Of the eight employees laid off, only one who was on the payroll on January 20 had not signed a union card. The Company admittedly was aware that two, James Hayes and Dennis Mendoza, were on the union organizing committee. Two others of the eight, Wensuc and Siebuhr, worked in the hassocks and accessories department in which Supervisor Drumwright had been so active in questioning his subordinates about their union sympathies or engaging them in discussions about the Union. Eight of Drumwright's subordinates, including Harold Posey, testified to conversations with Drumwright about the Union. Posey, it will be recalled, told Drumwright that he did not think too much of the Union. Word of Posey's lack of sympathy with the Union reached Superintendent Jenks, as Jenks' testimony indicates. As above stated, Posey was not laid off, although he had the same seniority as Dennis Mendoza. There is other testimony which indicates that the Company had knowledge of the union sympathies of the men laid off. James Hayes testified without contradiction that Superintendent Jenks told him, when he went back after his layoff to inquire when he might expect to be called back, that the Company laid off "nonunion people" "as well as union people."

While there is additional testimony in the cases of Hayes and Sanchez which, if credited, strongly suggests that antiunion considerations motivated the Company's selection of them for layoff, in the case of Sanchez, I do not credit his testimony,[13] and in the case of Hayes, I find it unnecessary to resolve the conflicting testimony.[14]

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[13] Sanchez testified that Jenks told him on February 19 that "he was going to lay [him] off because the Union was coming in but he was going to call [him] back." About a week after the election, according to Sanchez, he went back to the plant and inquired about getting his job back. On this occasion Jenks told him, said Sanchez, that he was not going to be taken back "because [he] came in and vote[d]." Jenks denied having said any such thing on either occasion. It would have been completely out of character for Jenks to have made such incriminating remarks. Sanchez' testimony is rejected.

[14] Hayes went back to the plant on March 17, less than 2 weeks before the first of the laid off employees was called back to work, and asked Jenks when he would be recalled. Hayes testimony concerning Jenks' response and the conversation which followed is set forth below:

> 'Not right now,' he says, 'I have no idea because the sales are still off in every department,' and he brought out, he went and got a list and showed it to me which indicated the sales in every department were off and he said, 'As you can see they are off and I don't know when I will be able to call you back.' And then I asked him if the fact that I had anything to do with the union and that I was a union organizer had anything to do with the layoff and he says, 'There would have been a layoff at that time had the union been trying to organize at the plant or not because of lack of worth, but,' he says, 'to be perfectly honest with you we have never laid off a cutter because we spend a lot of money training a cutter, and he says,

This portion of Hayes' testimony is corroborated by Jenks. However, the following portion of Hayes' testimony is vigorously denied by Jenks:

> I want to be perfectly honest with you, Jim, had you not been a union organizer or strictly for the union we would have found some way to keep you.

It appears unlikely to me that Jenks would have made such a

c. *The Company's contentions regarding the layoffs*

General Manager Jones ascribed the February 19 layoff to the fact that the Company's shipments of finished products were down considerably at a time when the Company should have been going into one of its busiest seasons. At the hearing Jones relied on a study of the Company's records showing that the dollar value of the Company's shipments to customers, comparing approximately the first 4 months of 1965 with the corresponding period in 1964, showed a substantial drop in 1965. In his testimony, Jones referred to these figures as sales figures. Superintendent Jenks, who also participated in the decision to put the layoff into effect, testified that the basis for the decision was lack of work. When asked how he determined that there was a lack of work, Jenks answered as follows: "Total orders by departments were down as much in some cases as 50 percent, units on order as compared to 1965 to 1964." Later in his testimony Jenks elaborated as follows:

> On February 2, I checked total units on orders and orders that were to be scheduled for immediate delivery. Our accessory total units showed that we were down 21,000 pieces over the—in 1965, we were down over 1964, 20,000 pieces. In our marine department it reflected 8,000 pieces down, which is of some concern, Grave concern.

The testimony of Jones and Jenks concerning the drop in shipments and orders on hand is not wholly

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bald admission of the antiunion motivation behind Hayes' inclusion in the layoff. It would be inconsistent with Jenks' conduct throughout the case. As found below, Jenks' transgressions have been of a much more subtle variety. However, in view of my finding below that the layoff as a whole was discriminatively motivated, I find it unnecessary to resolve this conflict in the testimony.

meaningful, at least insofar as providing an explanation for the layoff is concerned, without information as to the number of employees during the comparable period in 1964. To illustrate, if the Company had only half as many employees in 1965 as in 1964 and yet produced more than half as many items, there would be less need for a layoff in 1965 than in 1964, even though shipments in 1965 might be down almost one half in 1965 below the 1964 level. The Company has not furnished any information concerning the number of its employees in 1964.

It cannot be assumed that the number of Company's employees remained fairly constant from 1964 to 1965 because the record shows that turnover is substantial at the plant.[15] Consequently the figures as to the drop in shipments alone do not give an accurate measure of the amount of work available for the employees in the various departments on February 19. And, as shown below, the figures as to the total orders on hand were in a definite uptrend in the period from December 1964 through March 1965.

Moreover, a drop in the Company's shipments compared with a year earlier does not necessarily result in less work for the employees laid off for two reasons. First, the items being shipped are not necessarily the items being currently produced. They may be items manufactured weeks or months earlier. This is shown by the figures concerning the number of items made and shipped in the months of December 1964 through March 1965, which are given below. No necessary correlation appears. Secondly, the employees laid off were engaged in work closely related to the manufacturing process. None of them was engaged in a strictly shipping operation. Thus, if the Company continued actually to produce during the period immediately pre-

[15] In the first 3 weeks of January 1965, the Company hired 12 women, and the employment of 8 employees, including 4 men, was terminated for one reason or another.

ceding the layoff the same number, or a larger number of its manufactured products, than in the preceding month, for example, then it is wholly immaterial, insofar as the question of the amount of work available for the employees laid off is concerned, that currently shipments were below the level of the preceding year. The figures discussed below concerning the Company's production and backlog of unfilled orders establish that, with the exception of wire cushions, the Company's production at the time of the layoff was at least at the level of the Company's production in January 1965 and, in most departments affected by the layoff the Company was producing at a higher rate on February 16, when it decided to put the layoff into effect, than it had in January 1965. In addition, these figures show that the Company's backlog of unfilled orders steadily increased in all departments affected by the layoffs in January, February and March 1965.

d. *The facts concerning the Company's production and unfilled orders*

Two of the employees laid off, Gary Wensuc and John Siebuhr, were tufters in the hassocks and accessories department.[16] The Company's records show the following as to the number and value of hassocks made, shipped[17] and on order in the months in question:

[16] For about 3 days before his layoff Siebuhr had been assigned to pounding pillows, but this was admittedly a temporary assignment, and his layoff was from the hassocks department.

[17] Although for the reasons above stated, the figures for the number of items shipped and their value are not material on the question of the availability of work for the laid off employees (the shipments may have been from inventory and not current production), they are included because they refute the suggestion which is implicit in the claim that a layoff was necessary, that the Company's business was in a declining phase.

HASSOCKS

Month to—	Made	Shipped	Value [18]	On order
12-23-64	17871	18702	$81,990	1358
1-29-65	11343	12817	43,487	3987
2-16-65	9013 [19]	5994		5701
2-26-65	12418	11062	45,739	3786
3-31-65	14379	12164	62,285	6364

The above figures show that after the Christmas rush in hassocks was over, the work on hassocks progressed in a steady uptrend in January, February and March 1965.

Dennis Mendoz was a boxer of chair and chaise recovers in the hassocks and accessories department. The Company's records show the following as to the number of chair and chaise recovers sewed, shipped, on order, and the value of all accessories shipped: [20]

CHAIR AND CHAISE RECOVERS

Month to—	Sewed	Shipped	Value	On order
12-23-64	6618	1696	$14,690	4372
1-29-65	10388	5970	43,487	9222
2-16-65	8918	1597		10876
2-26-65	16806	8376	45,739	5643
3-31-65	15186	9999	62,285	14067

Dale Haney was one of two boxers of wire cushions in the seat cover and wire cushion department. The Company's records show the following regarding the

[18] The value figures given in this and the following tables represent the value of the Company sales (shipments) for the entire month of December.

[19] In this and in the succeeding tables the number of items processed in February through the 16th are given because Superintendent Jenks testified that the decision to make the layoffs was reached on February 16.

[20] The value figures include the value not only of the chair and chaise recovers shipped, but also the value of other accessories made in the department.

number of wire cushions made, shipped and on order in the periods in question:

WIRE CUSHIONS

Month to—	Made	Shipped	Value	On order
12-23-64	15296	4179	$10,329	3776
1-29-65	18696	7533	24,703	6185
2-16-65	9618	7364	----------	21680
2-26-65	14897	17484	47,470	22764
3-31-65	14833	26351	95,999	29036

While the number of wire cushions produced in January, February and March 1965 was in a downtrend during this period, the Company's backlog of unfilled orders jumped considerably during these months, despite greatly increased shipments in February and March. From this it appears that the reduced level of production of wire cushions was the result, not of the lack of orders to work on, but rather of an internal company decision to permit production to fall behind its backlog of unfilled orders.[21]

James Hayes was a cutter in the marine department. The Company's figures as to the number of items made in the marine department on successive dates in December 1964 and early 1965 give an approximation of the amount of work available for Hayes at the time of his layoff. Also included are the

[21] Production of seat covers may have dropped in part due to the fact that occasionally as many as four female employees in the department were engaged part time in the boxing operations which Haney had performed before his layoff. Superintendent Jenks testified that female operators or inspectors performed boxing operations on occasions for as much as 3 or 4 hours a day. Naturally the layoff of one of two boxers, with only a small drop in production, made it very difficult for the remaining boxer to get the work done.

figures for the value of the marine items shipped each month. These figures are as follows:

MARINE DEPARTMENT ITEMS

Month to—	Made	Value	On order
12-23-64	11892	$20,005	18382
1-29-65	12239	29,943	8193
2-16-65	7337	----------	9327
2-26-65	12600	30,313	11294
3-31-65	11135	50,242	19581

The above figures show a fairly constant level of production in the marine department and a steadily increasing backlog of unfilled orders.

The marine department figures above stated are also relevant in the case of Bibiano Sanchez, who was a janitor in the area of the marine and seat cover departments. According to the Company, because of the asserted dropoff in the work in these departments and resulting decrease in the accumulation of scrap materials, it was possible to dispense with the services of one of the janitors and to consolidate his areas with those of other janitors. The figures above set forth as to the marine department production do not bear out the Company's contention regarding the reason for laying off Sanchez since they show an approximately stable level of production in the marine department in the months December 1964 through March 1965.

Nor do the figures for seat cover production support the Company's contention regarding the alleged decreasing need for Sanchez' janitorial services. The figures as to the number of seat covers made in the department show a steadily increasing volume of production in the period December 1964 through March 1965. They are as follows:

SEAT COVERS

Month to—	Made	On order
12-23-64	3260	1943
1-29-65	4250	401
2-16-65	2452	701
2-26-65	4287	1505
3-31-65	5460	2970

The two remaining employees in the layoff were Roy DeFoor and part time employee Wayne Stockebrand. DeFoor operated the slitter which produced welting or binding which is used on most of the items manufactured by the Company. DeFoor was the only employee in what was called the welt department. Superintendent Jenks testified that after DeFoor's layoff, the Company relieved its truckdriver of one of his two trips to the dump a day and that in the remaining half day the truckdriver performed the slitter operation. The truckdriver had previously operated the slitter.

I have detailed in the preceding pages the actual figures taken from the Company's records as to the number of hassocks, chair and chaise recovers, seat covers, wire cushions, and various marine items made at the Company's plant in the period involved in this case. These are items on which welting or binding is used. These figures, which show an uptrend in the amount of work being done in most of these departments, excepting the seat cushion department where there was a small decrease, indicate that the Company's requirements for binding should also have been at least as great at the time of the layoffs as in January 1965, before the Company decided that layoffs would be necessary. Under all the circumstances I cannot accept the Company's contenion that the Company's need for binding dropped to such an

extent that the Company's truckdriver could meet it in 4 hours a day.

With regard to Wayne Stockebrand, the part time employee who filled in for employees who were absent in his available time away from college classes, I am convinced from the figures as to the amount of work produced in the assertedly slow departments that the Company had as much or more work available for him on February 16, than it had previously when it was able to utilize his services to the limited extent that they were available.

e. *Conclusions*

The figures set forth above indicate that in the departments affected by the layoffs, excepting the wire cushion department, there was as much, if not more work available at the time of the layoffs than there had been in the preceding month or two. During this same time the backlog of unfilled orders gradually increased. This meant that the Company was actually falling behind in keeping abreast of its production requirements. Thus, the situation in these departments on February 16, when the Company decided on the layoffs was not one normally calling for even a temporary reduction in force.[22]

[22] In reaching this conclusion I do not wish to imply that there was sufficient work on the employees' regular job every day for every employee. Due to the large number of items manufactured by the Company and the variations in the items produced and the fluctuation in the numbers of each item made it appears that considerable shifting of employees from operation to operation must be necessary to achieve the maximum utilization of each employee's time. But this, I conclude, was a normal situation at the plant. In these circumstances, I do not deem it controlling on the question of whether the layoff as a whole was necessary, that work temporarily may have been slack for James Hayes at the time of the layoffs. This was

In view of this state of affairs I cannot help but regard the testimony of General Manager Jones and Superintendent Jenks regarding the dropoff in shipments in 1965 as compared with 1964 as misleading. Nor do I comprehend Superintendent Jenks' reliance on the drop in the number of total units on order as justification for the layoffs. As stated above, the Company's backlog of unfilled orders steadily increased in January, February and March 1965, despite increased production. While the Company's records as to the number of items on order do not show whether they are for immediate or future delivery, there was no reason why these orders could not be worked on and completed in advance, except the bulky items requiring stuffing. Furthermore, the Company, as Jenks testified, normally plans its production 6 months in advance. It has not even been suggested by the Company that its projections for 1965 as a whole contemplated that 1965 would be a poorer year than 1964. The record shows that the Company employed more employees at the time of the hearing in December 1965 than at the time of the layoffs. Under all the circumstances I conclude that there was no normal business justification for the Company's layoffs in the hassocks and accessories, seat cover and wire cushion, and marine departments in February 1965.

There remains the question as to the Company's true reason for the layoff. The Company's conduct from the inception of the Union organizing drive to the election leave no doubt but that the Company was strongly opposed to the organization of its employees by the Union. Six of the eight employees laid off had

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a problem which faced the Company continually in the operation of its business. In fact the Company's turnover was such that it might well have anticipated an attrition sufficient to take care of any temporary excess staffing.

signed union cards. The Company admits knowing that two of the eight employees laid off, Hayes and Mendoza, were members of the union organizing committee. The record indicates that the Company had knowledge of the union sympathies of many of its employees. Supervisor Drumwright and Superintendent Jenks had frequent conversations with employees about the Union. In addition, I have alluded to the testimony of Hayes that Superintendent Jenks mentioned to him that a nonunion empoyee was included in the layoff, which suggests that Jenks had knowledge of the union sympathies of those included in the layoff. I have also referred to the Company's contrasting treatment of Harold Posey, whom the Company had reason to believe was not sympathetic to the Union. Posey, who had the same seniority as Mendoza and who worked in the same department at almost the same job, was not laid off, whereas Mendoza, whom the Company knew was on the organizing committee, was. As soon as the election was over, and the Company no longer confronted with the possibility of having to deal with the Union, it decided to recall the laid off employees.

The employees selected for layoff were the male employees hired by the Company in the past 4 months. During this same 4-month period the Company had also hired 15 female employees who were not included in the layoffs. Since the first of August 1964, the Company had hired a total of 24 additional male and female employees. The layoff of all of the male employees hired in the past 4 months would naturally tend to make the female employees hired during this period apprehensive about their continued employment. These layoffs might even give rise to concern on the part of the 24 additional employees hired since August 1, 1964 that they might be next on the layoff

list, particularly if they had signed union cards. In any event, I conclude upon all of the facts of the case that the Company put the layoff into effect at the start of the election campaign in order to play upon the employees' fears that their continued support of the Union might place their jobs in jeopardy. Needless to say, employees who are anxious about keeping their jobs are less likely to take action which will obviously incur their employer's displeasure. The Company's position regarding the employees' affiliation with the Union had been made abundantly clear by this time. Under all the circumstances I conclude that the Company's February 19 layoff was one of the major steps in the Company's campaign to defeat the Union in the election. Accordingly, I find that the layoffs of February 19, 1965, violated Section 8(a)(3) and (1) of the Act.

2. The discharge of Mildred Jarvis on March 26

Mildred Jarvis was hired on March 1, 1965, and was assigned as floorgirl in the awning department. The floorgirl is responsible for passing bundles of awning pieces from one sewing machine operator to another, picking up the completed awnings from around the sewing machines, inspecting them for obvious flaws and returning them to the operator for repairs if necessary, and carrying away the completed awnings. The sewing machine operators are paid piecework rates and their earnings suffer if the floorgirl fails to handle her job efficiently.

Jarvis failed promptly to pass along the completed bundles, failed to inspect them with sufficient care and adopted an indifferent attitude towards the operators, in general. One operator, Elwyn Hart, became so dissatisfied with Jarvis' work as a floorgirl that she insisted to the inspector, Laura Jordan, that Jarvis no

longer service her machine. This was arranged. Jordan passed along the operators' complaints about Jarvis to Ernest Stockstill, the supervisor in the awning department, and to Superintendent Jenks.

Finally, as a result of complaints that Jarvis could not perform the work in the awning department, that she could not get along with the girls there, and that she was a "whiner," Jenks transferred Jarvis to the marine department on March 23. In this department Jarvis was assigned to operate a machine which used heat to seal a plastic bag which is used as an insert in life vests. Kapok is scattered in the atmosphere in the course of this operation. Jarvis not only had trouble effecting the proper seal on the bags but the kapok bothered her lungs. Jarvis informed Charles Hoyle, the supervisor over the marine department on the morning of March 24 that she had coughed up blood the night before, and inquired whether the kapok would bother her lungs. Later that day Hoyle told Jenks about Jarvis' complaint about coughing up blood the preceding evening. The two men then decided to let Jarvis go at the end of the week. Jenks spoke to Jones about the matter, and mentioned the complaints which he had received about Jarvis while she was in the awning department. Jones approved the decision to let Jarvis go that Friday afternoon and instructions were issued that day to the payroll department to get Jarvis' final checks ready.

The following Friday, March 26, was the day of the election. On the morning of the election a number of the girls in the marine department were wearing signs reading "NO" pinned to their blouses. (The official ballot to be used in the election was to be voted "YES" or "NO" on the question "Do you wish to be represented for the purposes of collective bargaining by Amalgamated Clothing Workers of America, AFL–

CIO?") After inquiring of one of the girls as to whether it was permissable to wear such signs, Jarvis pinned a 3" x 5" card on her blouse on which was printed "Yes" in large letters. Later Superintendent Jenks came by and asked her, "Mrs. Jarvis, you do know you are not entitled to vote in this union election, don't you?" Jarvis answered that she was aware of this fact. The foregoing is Jarvis' testimony.

About 4 p.m., after the election was over, Jenks went up to her at her work station, accompanied by Supervisor Hoyle. Jenks told her, according to her testimony, "Mrs. Jarvis, as you very well know, you did not work out well in the awning department and you have been complaining about the kapok and we just can't use you any more." [23]

In view of the fact that Jarvis' only prominent union activity occurred after the Company decided to discharge her, this could not have been a factor in her discharge. With the exception of the testimony of Jarvis herself, the testimony is uniformly to the effect that Jarvis did not perform satisfactorily in either of the departments in which she worked. While it appears that the Company did not overextend itself to give Jarvis a chance to develop in the marine department, to which she was assigned 2 or 3 days before her discharge, I find that the General Counsel has failed to establish by a preponderance of the

[23] In making the foregoing findings I have had to resolve various conflicts in the testimony. In part I have credited Jarvis' testimony and in part I have accepted the testimony of the Company's witnesses. With respect to the timing of the decision to discharge Jarvis, which the General Counsel argues was not arrived at until after she wore the vote "YES" sign, I have accepted the mutually corroborative testimony of Hoyle, Jenks and Jones that this decision was reached on Wednesday, March 24. The General Counsel has presented no evidence to the contrary.

testimony that the discharge of Jarvis was motivated by antiunion considerations. The allegations of the complaint concerning Mildred Jarvis are hereby dismissed.

3. The discharge of Bibiano Sanchez on March 31

As found above, Sanchez, the janitor in the marine and seat cover department, was laid off with the others on February 19. About the time the Company recalled the other laid off employees, the Company decided not to recall Sanchez. On March 31, 1965, the Company issued a separation notice to Sanchez stating, as follows: "Unable to perform duties satisfactorily during trial period." Sanchez had been hired on February 9, 1965, and had only worked 10 days at the time of the layoff. General Manager Jones explained the Company's failure to recall Sanchez, as follows: "He was on a probationary period. Several of our supervisors said please don't bring him back, he couldn't sweep the floor or couldn't do anything." I credit Jones' testimony in this regard and accordingly dismiss the allegations of the complaint based on Sanchez' discharge.

D. *Conclusions concerning the Company's acts of interference, restraint and coercion and its refusal to bargain collectively with the Union*

1. The law and its application on the facts of the case

It has long been settled that an election is not the only means by which a union's representative status may be established. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71–72; *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 624 (C.A. 2), cert. denied, 355 U.S. 818. Thus, there is no absolute right vested in an employer to demand an

election. Where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit designating the Union as their bargaining representative, an employer violates Section 8(a)(5) if, absent a good-faith doubt of the Union's majority status, he refuses to recognize and bargain with the Union. *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (C.A. 2) cert. denied, 370 U.S. 919; *Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128, 135–136 (C.A. 8); *N.L.R.B.* v. *Bedford-Nugent Corp.*, 317 F. 2d 861, 864 (C.A. 7); *N.L.R.B.* v. *Elliott-Williams Co.*, 345 F. 2d 460, 463–464 (C.A. 7); *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917 (C.A. 6); *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 61 LRRM 2177, decided January 14, 1966 (C.A. 2). The Company does not dispute this proposition. It simply contends that the *Joy Silk* doctrine is not applicable upon the facts of this case.

The Union passed out folders inviting employees to join on January 7, 1965. The very next day the Company had all of its employees assembled in groups and had Jones, its general manager, address them. After frankly stating that the Company was "opposed to unionization," Jones listed various benefits which he pointed out that they had obtained without the help of any union. In a question-and-answer period at the end of one of these talks, Jones brought out that there was no assurance that present benefits would not be lost if the Union organized the plant, and added that it depended upon the negotiations. Subsequently the Company in communications to its employees repeatedly made statements to the effect that bargaining negotiations might result in the loss of present benefits. While the Company also noted that benefits possibly might be improved, the emphasis was placed

on the adverse effect on existing benefits of union negotiations.

Within 3 days after the union organizing meeting on January 12, the Union succeeded in obtaining the signatures of a substantial majority of the employees on cards authorizing the Union to represent them for collective bargaining purposes.

On January 18, the Company sent a letter to each employee which, after again stressing the benefits which they had achieved without union pressure, stated:

> These outsiders have promised that all of the benefits we now give will be continued. This is a false promise. What you might be able to get depends upon negotiations. Nothing you have now is assured. Any negotiations may result in less than what you have now.

The letter concluded with the suggestion, "Think twice before signing everything. If you have already signed a card, you may ask for it back." The next day in a release to the employees in which it again stressed the possibility of the employees' losing of present benefits, the Company urged as follows: "If you have already signed a card, ask for it back before it is too late." Later that day the Company, in a second release, toned down its earlier request to the employees to withdraw from the Union, stating that it was up to the employees to decide whether to withdraw, and that whatever decision they reached would not affect their jobs.

As stated above, the Union, by letter dated, January 18, requested the Company to recognize and bargain collectively with it, and offered to prove its majority status by a card check to be conducted by a disinterested third party. The Company, in its letter of Jan-

uary 20, refused and insisted that the Union go to an election.

Later on, a day or two after the Company received the letter from the Union notifying it of the names of the members of its organizing committee, the Company had the plant superintendent summon each member of the committee away from his or her work and took them to the office of General Manager Jones, the Company's top official at Emporia. Each committee member was spoken to individually by Jones. Although there is no specific evidence that any of the committee members had been permitting any union activities to interfere with the work of either himself or of others, Jones warned each committee member that "any outside activities that interfered with [their] work would call for dismissal." This warning was given the employees even though Jones, himself, had previously summoned all of the employees away from their work and given them a talk in which he urged them to reject the Union. And, as found above, Superintendent Jenks in the coming weeks repeatedly had employees taken away from their work to his office where, in talks lasting more than an hour, he sought to dissuade them from their adherence to the Union. Particularly in view of the frequency with which the Company's officials and supervisors utilized company time to convey their arguments to employees against the Union, necessarily interfering with production at times, Jones' warnings to the committee members individually had a coercive impact and violated Section 8(a)(1) of the Act.[24]

[24] While it is not necessary, to establish a violation of Section 8(a)(1) of the Act, to show that the conduct in question actually had a coercive effect, the record in this case shows that Susan Blount, after thus being warned by Jones, went to Superintendent Jenks and asked whether her job was in danger because of her being on the committee.

The Company agreed to a consent election on February 18 and it was scheduled for March 26. The very next day, February 19, the Company laid off the eight last hired male employees. As found below, this layoff was not justified by the amount of work on hand at the time and the Company's backlog of unfilled orders, and was motivated by the Company's desire to raise fears in the minds of the Company's other newly hired employees, of which there were many, as to the possible adverse consequences of continuing to support the Union.

Lee Drumwright, the supervisor in the hassocks and accessories department, in which almost a third of the Company's employees work, was active from the very beginning of the union organizing drive in questioning his subordinates about their attendance at union meetings, their union sympathies, and the union leanings of other employees. On one occasion, in February, Drumwright warned Richard Solis, a member of the union organizing committee, that committee members "would probably be let go after the election." Such a threat unquestionably constituted interference, restraint and coercion in violation of Section 8(a)(1) of the Act. In light of the threats of Drumwright and Jenks, discussed above, and the layoffs of February 19, I find that Drumwright's questioning of employees about union matters assumed a coercive aspect and constituted a further violation of Section 8(a)(1) of the Act.[25]

[25] Sue Aggers testified that Supervisor Hoyle of the wire cushion department threatened a group of employees that he "was afraid that the plant would be closed down if they went union." Hoyle denied having made any such statement. No other employee attributed any kind of antiunion remark to Hoyle. Under all the circumstances I credit Hoyle's denial.

While the Company urges that General Manager Jones' so-called neutrality talk to a group or groups of the company employees about February19 relieved the Company from all responsibility for Drumwright's threat and his extensive questioning of employees, I find no merit in this contention in view of the fact that Jones himself had threatened the members of the organizing committee individually with reprisals and Jones himself was responsible for the discriminatory layoffs of February 19. In these circumstances the employees could place little reliance on Jones' statement that the Company would refrain from threats and interrogation.

As the day of the election drew nearer, Superintendent Jenks actively engaged in antiunion conversations with union supporters. To Committee Member Larry Noble, Jenks, after reiterating the Company's position that the Union had falsely stated that the employees could not lose anything in the negotiations, went on to say that "during negotiations, both sides would sit down with a blank sheet of paper and they would negotiate from there." I find that this statement, in the setting in which it was made, conveyed the message that the selection of the Union would result in the loss of existing benefits. Similar statements that negotiations would "start from scratch" have been held by the Board and the courts to constitute interference, restraint and coercion in violation of Section 8(a)(1) of the Act. See *Marsh Supermarkets, Inc.*, 140 NLRB 899, 901–902, enforced 227 F. 2d 109 (C.A. 7); *Suprenant Mfg. Co.*, 144 NLRB 507, 517, enforced in this respect, February 27, 1965, 58 LRRM 2484, 2487 (C.A. 6; *Federal Envolope Co.*, 147 NLRB 1030, 1040 n. 25.

Jenks also uttered a veiled threat of discharge against Committee Member Marcia Scott when he

warned her that he could have fired her because of reports which he had received about her "pushing" the Union on company time, irrespective of the truth of the reports. Even though Jenks might lawfully have discharged Scott for misusing company time, his warning to her in the circumstances in which it occurred went far beyond the needs of preventing interference with the work of the plant, and in these circumstances tended to have a coercive effect. Similarly beyond the bounds of Section 8(a)(1) of the Act was Superintendent Jenks' action in granting Clements' request for temporary wage relief in the manner in which he did. By expressly linking the granting of this relief to Clements' giving her support to his antiunion drive, Jenks was utilizing a grant of a benefit in a way forbidden by the Act. It matters not that the benefit granted was not a large one or that it was reasonable under all the circumstances to grant the wage adjustment made. The Act forbids the utilization of an employer's power to grant economic or other benefits in such a way as to further its antiunion ends.

In the week or 10 days before the election, the Company intensified its propaganda campaign against the Union. Its releases to the employees, which were put out every day or so, all ended with an emphatic "Vote NO." In some of its releases the Company, purporting to explain the consequences of union membership, issued interpretations of selected union documents, based upon piecemeal presentation of the contents of the documents. Such a presentation, in my opinion, tends to give rise to misleading impressions among the employees concerning various consequences of union membership, including their right to control their decision to go out on strike.

On March 25, the day before the election, the Company issued its final appeal to the employees to

"VOTE *NO*!" In this release the Company, among other things, repeated the warning which General Manager Jones first uttered on January 8, when apprised for the first time of the union organizing drive, that a union contract *"can mean less than you have now."* The emphasis is the Company's. This was the fourth time the Company had stressed this theme in releases to its employees.

In the context in which these statements were made I conclude that they amounted to warnings that the employees might receive less in bargaining negotiations than they presently enjoyed, and as such constituted threats of reprisals outside the protection of Section 8(c) of the Act. The Company repeatedly reminded the employees in its releases that it was the Company and not the Union which decided what benefits were feasible to grant. Several times it cited the benefits which it had voluntarily granted without any prodding from a union. While the Company purported to be stating the possible consequences of lawful bargaining negotiations, the emphasis was placed each time on the possible adverse effects. Superintendent Jenks' comment to Larry Noble that the parties would negotiate from "a blank sheet of paper" reinforces my conclusion that the Respondent intended by harping on this theme to convey the idea that benefits would be less with a union than without. The statements in question were integral and basic part of a deliberately planned course of conduct aimed at defeating the Union in the election. This course of conduct, as found above, included discriminatory layoffs and threats against union committeemen by the Company's top officials. For the foregoing reasons, in my opinion, it is reasonable to infer that the Company intended by the statements in question to convey the impression to the employees that it

might withdraw some existing benefits if it were forced to negotiate with the Union. Here, as in *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409, "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." See also note 3, on page 409.

The course of conduct summarized in the preceding paragraphs, in my opinion, interfered with the employees' freedom of choice of representatives in the election and precludes any finding that the Company acted in good faith in insisting upon an election. I would reach this conclusion even were I in error in finding that the Company's harping on the theme that a union contract could mean a loss of present benefits. The Company scarcely argues that it had a factual basis for doubting the Union's claim of majority status. It merely asserts that it is "incredible" that the Union could have signed up such a large number of its employees in such a short period of time. Something more than such an assertion is required to constitute a valid basis for a good-faith doubt as to a union's majority status. Under all the circumstances I find that here, as in *N.L.R.B.* v. *Joy Silk Mills*, 185 F. 2d 732, 741 (C.A. D.C.), certiorari denied 341 U.S. 914, the Respondent's conduct was "due to a desire to gain time and to take action to dissipate the Union's majority." In these circumstances, the appropriate remedy for the Company's course of conduct leading to the Union's defeat in the election is an order to bargain collectively with the Union if in fact a majority of the Company's employees in an appropriate bargaining unit had authorized the Union to bargain collectively in their behalf by January 20, 1965 when the Company received the Union's request for recog-

nition and bargaining. *Bernel Foam Products Co.*, 146 NLRB 1277. See also *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920–921 (C.A. 6) and cases therein cited.[26]

Furthermore, even if it be assumed that the Company acted in good faith in insisting upon an election in the first place, a bargaining order is nevertheless appropriate to undo the effects of the Company's subsequent unfair labor practices. The courts have held that in refusal to bargain situations like the present, where the employer's unfair labor practices have rendered the holding of a free and fair election impossible, the Board may enter the usual bargaining order even though the Union loses the election. *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F. 2d 900,

[26] The complaint alleges that the Company violated Section 8(a)(1) of the Act by denying the Union's request, made in its original letter requesting recognition, for equal time to answer company arguments against joining the Union and equal access to the Company's bulletin boards. Assuming, but not deciding that the Union made an adequate request for such equal treatment, I find that the circumstances of the case are not such as to warrant finding that the Company has violated Section 8(a)(1) of the Act in these respects. Since *Livingston Shirt Corp.*, 107 NLRB 400, the Board has not found an employer's denial of such requests violative of the Act *unless* the employer has maintained or discriminatorily enforced an unlawful or an excessively broad no-solicitation rule. See *General Electric Co.*, 156 NLRB No. 112, 61 LRRM 1222, 1223. It is not contended in this case that the Company has either maintained or discriminatorily enforced an improper no-solicitation rule. Particularly in view of the new rule laid down in *Excelsior Underwear, Inc.*, 156 NLRB No. 111, 61 LRRM 1217, requiring employers in representation cases to furnish all parties at the outset with lists of names and addresses of all employees eligible to vote, I regard it as unwise to consider in this case departing from the *Livingston Shirt rule.* See *General Electric Co.*, 61 LRRM, at 1223. The denial of access allegations of the complaint as amended are hereby dismissed.

904–905 (C.A. 2), certiorari denied, 348 U.S. 964; *Irving Air Chute Co.* v. *N.L.R.B.* 350 F. 2d 176, 182 (C.A. 2); *N.L.R.B.* v. *Gotham Shoe Manufacturing Co., Inc.*, decided January 14, 1966 (C.A. 2) 61 LRRM 2177—and cases therein cited.

Finally, it has been held in a number of cases that where an employer's acts of interference, restraint and coercion in violation of Section 8(a)(1) of the Act dissipate a union's majority and prevent the employees from freely exercising their choice of representatives, the Board may, in order to remedy these unfair labor practices, issue an order directing the employer to bargain collectively with the Union upon request, provided that the Union had a majority at all relevant times. *Greystone Knitwear Corp.*, 136 NLRB 573, 575–576, enforced per curiam, 311 F. 2d 794 (C.A. 2); *Summit Mining Corp.* v. *N.L.R.B.*, 260 F. 2d 894, 900 (C.A. 3); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F. 2d 575, 591–592 (C.A. 3) cert. denied, 364 U.S. 933; *Editorial "El Imparcial" Inc.* v. *N.L.R.B.*, 278 F. 2d 184, 187 (C.A. 1); *D. H. Holmes Co.* v. *N.L.R.B.*, 179 F. 2d 876, 879–880 (C.A. 5); *Teamsters Local No. 152* v. *N.L.R.B.*, 343 F. 2d 307, 309 (C.A.D.C.) See also *Western Aluminum of Oregon, Inc.*, 144 NLRB 1190, 1191–1192; *Freeport Marble & Tile Co.*, 153 NLRB No. 63, 59 LRRM 1561, 1565. Under the doctrine of this line of cases, also, a bargaining order is appropriate in this case.

2. The Union's majority status in the appropriate unit on January 20, 1965

For the purposes of the consent election the parties stipulated that "All production and maintenance employees at the Employer's Emporia, Kansas plant, ex-

cluding office clerical employees, salesmen, guards and supervisors, as defined in the Act" constitute an appropriate collective-bargaining unit. The Company concedes, for the purposes of this case, that there were 172 employees in the appropriate unit on January 20, 1965, including Wayne Stockebrand whom I find should be included in the appropriate unit as a regular part time employee.[27]

Cards signed by 104 employees before January 20, 1965, were received in evidence in this case.[28] In addition, the record shows that Nancy Brown signed a card on January 7 and mailed it to the Union, but it became lost. Thus, the record shows that a total of 105 employees signed cards authorizing the Union to represent them for collective bargaining purposes before January 20, 1965, the date on which the Company received the Union's letter requesting recognition.

[27] The Company in its brief takes no position with respect to the inclusion of Stockebrand in the unit. While disagreeing with the reasoning underlying the Board's exclusion from the unit in card-check cases of employees on a military leave of absence (there were three employees in this category on January 20, 1965), the Company does not take issue in this case with the exclusion from the unit of the three employees on military leave.

[28] The index to the official transcript of testimony and the Official Reporter's marking on the exhibit itself does not in every case reflect the fact that the card was received in evidence. I have considered each case individually and find that the cards of all employees listed in Appendices C through G were received in evidence at the hearing. The cards of 109 employees were marked for identification in this case (while the cards were marked GC 9–1 through GC 9–110, no card was identified as GC 9–34). The cards of Floyd Boes, GC 9–14; Nancy Brown, GC 9–33 (it was a second card signed after January 20, 1965); Thomas Brown, GC 9–23, Barry Hodgson, GC 9–110, and Wilma Tate, GC 9–108, were not offered in evidence in this case.

a. *The Company's contentions concerning the invalidity of certain authorization cards*

i. Introduction

With the exception of the card of Anita Bitler which is discussed in the footnote below, the Company does not challenge the authenticity of the signatures on the authorization cards which were received in evidence in this case.[29] While the Company does not challenge the authenticity of the remaining cards received in evidence in this case, it does seriously contend that many cards received in evidence may not be counted towards the Union's majority because of alleged misrepresentation made by union representa-

[29] Bitler printed her name on the top line of the card which is preceded by the words "Name (Please sign):" All of the rest of the card, except the address, was filled in in printing also. Bitler testified that she normally wrote out her signature in handscript. Admittedly Bitler read the card before she affixed her name. The card on which Bitler printed her name was one of a few used in the campaign which had an extra line for signature at the bottom which was preceded by the word "Signed." Bitler left this line blank. The Company contends that Bitler's card was not validly executed by her. The Company also points to Bitler's testimony that she did not intend to apply for membership in the Union. Such testimony, as the Board and the courts have held (see *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920–921 (C.A. 6)), is unreliable in cases such as this and I probably should not have permitted this testimony to stand. In any event, I do not believe Bitler's testimony in this regard. There is no evidence that Bitler at any time sought to revoke her bargaining authorization although the Company had suggested this course. See *Indiana Rayon Corp.*, 151 NLRB No. 5, p. 9. Under all the circumstances I conclude that Bitler's action in printing her name on the card constituted an adoption by her of the text of the card, including the bargaining authorization, and that the card has been sufficiently authenticated to be counted. See *Indiana Rayon Corp.*, 151 NLRB No. 132, 58 LRRM 1605, 1606 (card of Masters).

tives to the signers before the cards were signed. First, the Company contends that almost all of the cards relied upon by the Union are invalid because they were obtained either by Patrick or by other union solicitors acting under specific instructions from him to represent to those solicited that the cards were to be used *only* to obtain an election and would not be used for any other purpose, despite the unequivocal language of the bargaining authorization contained on the card. Alternatively the Company contends that the cards of certain employees are invalid because of representations made to them individually by union solicitors.

It is clear that as to any employees as to whom the record showed representations were timely made by union solicitors before they signed cards, that the cards would be used only for the purpose of an election and not for any other purpose, such cards would be invalid under the Board's holding in *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F. 2d 917 (C.A. 6) and *Gotham Shoe Mfg. Co.*, 149 NLRB 862, 873–874, enforced January 14, 1966 (C.A. 2), 61 LRRM 2177. It should be borne in mind, however, that in situations where it becomes necessary to establish a union's majority status by cards, that documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence of a showing of coercion in their procurement or representations that "despite the purpose clearly and expressly stated on the cards themselves, the cards would be used *only* for a different more limited purpose." *Aero Corp.*, 149 NLRB 1283, 1290, 57 LRRM, at 1490. Under the *Cumberland Shoe* and *Aero* decisions it is clear that a representation that "a purpose of the cards was to secure a Board election" is not enough to invalidate an other-

wise valid bargaining authorization (144 NLRB, at 1269). Or as stated in the *Gotham Shoe* case, 149 NLRB, at 874, "the tests for determining whether a card should be counted is based, not upon what an employee subjectively intended or understood but on (1) whether he was falsely told that the *only* purpose of the cards was to secure an election, or (2) whether he was induced to sign by trickery or beguilement." The Court in the *Cumberland Shoe* case expressly indicates its approval of this line of reasoning (351 F. 2d, at 920).

ii. The Company's general contention regarding the invalidity of authorization cards

The Company points to the testimony of a number of witnesses who testified that Union Organizer Patrick stated at the January 12 meeting that the cards were "only for an election" or that the "sole purpose of the cards is to get an election." However, with few exceptions, this testimony was elicited by Company counsel only in answer to leading questions after the witness failed to give this response when asked a non-leading question.

Other witnesses, who were not asked leading questions, testified to the contrary. Charlotte Hopkins, a witness for the Company on this aspect of the case, testified that Patrick had stated at the January 12 meeting that "the more cards that we got and more signatures, this would be better negotiating and also that this would bring up an election." when asked by the Company counsel "was anything said with reference to an election being the sole and only purpose of signing a union card," Hopkins answered, "No, in so many words I think this would, but I don't think it was directly like this." Cecil Nichols, a witness for the General Counsel, repeatedly denied that Patrick

had stated at the January 12 meeting that the "only purpose" obtaining signatures on the cards was to get an election. When pressed by counsel for the Company, Nichols stated that while Patrick mentioned an election, he did so in connection with explaining the consequences of the Company's probable refusal to grant the Union's request for recognition. John Bastin, who was called by the General Counsel, also denied that Patrick said at this meeting that the only purpose for signing a card was to have an election. Rather, according to Bastin, Patrick stated that "they needed a certain percentage to sign it before we could go ahead with our election." John Joss, a witness for the General Counsel, when asked what was told him at the meeting as to the purpose of signing a card, replied, "Well, they was going to represent us, it was kind of more or less to find out what it was about right then."

For the reasons stated below I do not regard the testimony upon which the Company relies, which was largely elicited in response to leading questions, as very convincing in the circumstances of this case. In the first place most of these witnesses only testified to the bare fact that Patrick had stated that the cards would be used "solely" for an election. They were unable to recall sufficient details about other statements made by Patrick or other circumstances at the meeting such as would indicate that they had a present recollection of the happenings at this meeting.[30]

[30] It should be noted that the employees were testifying concerning events at a union meeting which had occurred 7 to 11 months earlier. Naturally the employees' recollection was not fresh. Patrick was talking about matters with which they were unfamiliar and consequently their understanding of his remarks was imperfect. There was much confusion at the January 12 meeting and it was difficult for employees to remember what Patrick had said and what other employees (not representatives

Furthermore, all of the Company's employees had previously been asked by the Company to fill out questionnaires in which one of the questions was "1. Did you sign a union card under any of the following conditions or promises made to you by the Union or its agent? * * * (d) that the sole purpose of signing a card was to get a Labor Board election?" It does not take a very astute employee to sense from the nature of this question that the Company was seeking an affirmative answer. This fact alone raises a question as to the usefulness of the questionnaires and the statements, which were later taken from employees answering question 1 in the affirmative, as an aid to arriving at the truth in this case. The full text of the questionnaire is attached hereto as Appendix B.[31]

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of the Union) had said. After the meeting of January 12 and January 19 there were many discussions among the employees as to the consequences of having signed a union card, stimulated, no doubt, by the communications from the Company stating its strong opposition to the Union and suggesting that they withdraw. As pointed out below, it is understandable if in these circumstances some employees in these discussions sought to minimize the significance of their having signed a union card. It is also understandable that some employees, on the witness stand almost a year later, might attribute to Patrick statements which they had heard from other employees, not representatives of the Union. These are some of the reasons why I am inclined to regard with skepticism the testimony of employees who were able to state, in response to leading questions, little more than what was suggested in the question.

[31] The circumstances of the Company's having the questionnaires filled out are as follows: In May 1965, 3 months after the events in question, Superintendent Jenks asked employees individually to go up to the plant lunchroom where they were handed a copy of the questionnaire by one of the attorneys for the Company. The attorney told the employees that answering the questionnaire was voluntary (the questionnaire also stated at the top that the giving of information was "entirely volun-

Furthermore, despite the assurances given by the Company attorney that no reprisals would be taken against any employees because of information revealed in the questionnaires or the statements, employees in my experience, are not able entirely to rid themselves

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tary" and that the questions were being asked as part of an investigation by the attorney for the Company into unfair labor practice charges filed with the Board). Any employees answering that they had signed a union card under some condition were subsequently asked by Jenks to return to the lunchroom. There they were again told by an attorney for the Company the purpose of the interview and that participation was voluntary. Then the attorney asked questions and he wrote down the answers, in some cases rephrasing the witnesses answers. The employee was then asked to read the statement and sign. In some cases the employees wrote out the statements themselves.

The statements, with few exceptions follow a very similar pattern. From this pattern and also from testimony received at the hearing it appears that the Company attorney asked the following questions, among others, almost routinely:

1. Were you told by a union representative that the only purpose of signing a union card was to get a Labor Board election?
2. Did you sign the card for this reason?
3. In signing the card did you believe you were applying for membership in the Union?
4. In signing the card did you believe you were authorizing the Union to represent you in bargaining for wages, hours and other conditions of employment?
5. Were you told by any union representative that the cards would be used to request recognition without an election?

From the common pattern of the answers given to these questions and the fact that they utilize terminology with which the employees were unfamiliar (this is clear from the employees' testimony at the hearing), I conclude that for the most part the employees gave yes or no answers to the attorney's questions and that the language used in the statements was largely the attorney's. This fact detracts from the usefulness of the statements even as an aid to refreshing the witnesses' recollection at the hearing.

of their fears that they may suffer in some way if they fully disclose the nature of their support of a union. This is particularly true in situations like the present where the Company had so openly expressed its intense opposition to the Union. Consequently in these situations employees are apt, when asked by the Company's attorney to discuss the nature of their association with a union, to give an answer which is likely least to incur the employer's displeasure. So they minimize the extent of their support of the Union.

Because of these factors I do not regard these statements as being sufficiently reliable in most cases to be used as a guage against which to test the witnesses' testimony on the witness stand. Nor do I believe that the truth is always forthcoming when an employee, who at first testifies somewhat inconsistently with the statement, belatedly acknowledges, when confronted with the statement, that the facts therein set forth are true. It takes a rugged employee, indeed, when facing the Company's two top officials at counsel table, to admit from the witness stand that he had not told the whole truth when interviewed by the Company's attorney.

Aside from members of the organizing committee who heard Patrick make a second talk to the committee members after the general meeting on January 12 was over, who I find misconstrued Patrick's remarks at this second meeting, only two employees gave testimony supporting the Company's "only for an election" contention in response to nonleading questions. These were Gene Brent, who was called by the General Counsel, and William Lowman who was called by the Company. While both Brent and Lowman had difficulty recalling all of the events at the meeting, they both appeared to be testifying sincerely. However, in view of the testimony of Bonitt, Patrick and

some others, including Company witnesses, which is inconsistent with the testimony of Brent and Lowman, and in view of certain circumstances discussed below which are not controverted, I cannot give controlling effect to the testimony of Brent and Lowman.

In addition to the "barebones" testimony in response to leading questions that Patrick represented to the employees at the January 12 meeting that authorization cards would be used only for the purpose of an election which is discussed above, the Company also relies on the testimony concerning a question asked of Patrick at the January 12 meeting as to whether employees signing union cards had to join the Union. I have found, based on the fact that only those who attended the organizing committee meeting testified concerning such a question, that this question was asked not at the general meeting, but at the subsequent committee meeting. Donald Neuenschwander, one of the original supporters of the Union, testified in response to a nonleading question that he thought he had asked Patrick at the January 12 meeting whether the employees, if they signed a card, had to join the Union. Patrick replied according to Neuenschwander, "that it was just to get an election, in other words, so they could bargain with the Union." Three witnesses for the Company, all members of the Union's organizing committee, also gave testimony concerning the question asked of Patrick at this meeting. These three witnesses were Elwyn Hart, Gary Hinderliter, and Mary Silva. All testified in response to nonleading questions that Patrick answered to the effect that the language on the card was not binding on the signers, that the cards were only to see if enough employees were interested to hold an election.

The testimony of Sandra Fraser (Soendker), another member of the organizing committee, con-

cerning this question places a different light on Patrick's answer. Fraser, when asked by the Company on direct examination whether any questions were asked at the meeting about the wording on the cards, was unable to recall. The Company then asked the following questions:

> Q. You stated in Respondent's Exhibit 17, "Jay Dee Patrick told us the main purpose was to keep things alive and keep things talked up, we were to ask others to sign cards. The purpose for the cards was to see how many were interested in an election. He was asked at the meeting about the language of the card and if this restricted the signer, and he said the cards had nothing to do with the membership." Do you recall that now?
> A. Yes.
> Q. Is that the truth?
> A. Yes.

When questioned by counsel for the Union, Fraser testified that Patrick explained that "we would vote whether we wanted the Union first and then we would nominate a negotiating committee" to negotiate for "wages and benefits and everything." In response to a question by the General Counsel as to whether Patrick had said anything about money, Fraser answered that "money wouldn't be involved until after the election and we had the Union." Laura Jordan, another member of the organizing committee, gave testimony concerning a similar question put to Patrick at the second union meeting on January 19. It is not disputed that the same questions were asked at both meetings. Called as a witness by the Company, Jordan testified as follows:

> They was wondering—one in particular, one girl said she didn't like the way it (the card) was worked so we asked about the wording on the thing and he said it was just to get an elec-

tion for now and we would join the union when we had the contract negotiated and that the people had approved of the contract they had negotiated for.

In resolving the conflict in the testimony concerning Patrick's statements at the January 12 meeting I have taken into consideration the following uncontroverted facts. Patrick read to the employees at the general meeting the text of the card which states that the signers apply for membership in the Union and authorize it to represent and negotiate for them regarding wages, hours and other conditions of employment. This appears wholly inconsistent with holding out to the employees that they should pay no attention to the language on the cards. It is also undisputed that Patrick at the January 19 meeting read to the employees the letter which he had sent to the Company requesting recognition upon the basis of the cards which the Union had obtained during the past week. It seems unlikely to me that a union representative who only a week earlier had represented to the employees that the cards would be used only for an election would give publicity to an act, which if the Company's position is sustained, amounted to an outright breach of faith.

There was no need for Patrick to make representations at the January 12 meeting that the cards would be used only to obtain an election. These are the kind of representations which are sometimes made by union organizers when they are failing to obtain sufficient cards to meet their goal and the representation is then made in an effort to persuade a few reluctant holdouts to sign cards. This was not the situation at the January 12 meeting. Far from it. Both Patrick and Bonitt were surprised by the size of the turnout on January 12. They had no reason at the start of the

campaign, in view of the large turnout at the meeting, to anticipate failure in the organizing drive. Furthermore, in any organizing campaign, the Union's interest is in gaining converts to its cause and not merely in obtaining an election in which the employees can express their desires for or against union representation by secret ballot. The logic of the situation, in my opinion, militates against Patrick's having made representations which tended to defeat the Union's objectives in conducting the organizing drive.

Finally, there is no evidence that any of the card signers at any time withdrew or revoked their bargaining authorization. The most that the record shows in this respect is that one employee, Ada Dill, made a half-hearted attempt to get her card back but did not follow through on it. In view of the fact that the Company had repeatedly requested employees to withdraw their union cards, the fact that none did is significant. Such inaction in these circumstances is wholly inconsistent with the Company's claim that a number of the employees signed cards only to give themselves an opportunity later on in an election to decide whether they desired representation by the Union. See *Indiana Rayon Corp.*, 151 NLRB No. 5.

Viewing the conflicting testimony concerning Patrick's statements, at the January 12 meeting in the light of the considerations discussed above I conclude, as indicated above, that he did not represent either at the general meeting or the later meeting of the organizing committee that the cards would be used only to obtain an election. Rather I find, in accordance with the testimony of Patrick and Bonitt and several of the employees, that Patrick, after reading the text of the card, explained the procedure normally used in obtaining union recognition, stated that it would be followed in this case, but that very likely the

Union would have to go to an election. The card, of course, was an *application* for membership to be acted upon by the Union in accordance with its usual procedures. Signing the card, as Patrick explained, did not automatically constitute the signers dues paying union members. If, as he anticipated, the Union had to go to an election, the employees would have a chance to vote in secret on whether they wanted union representation or not and if the Union lost the election the Union would abandon its organizing activities. It is this aspect of Patrick's talk at the general meeting which, in my opinion, gave rise to the confusion in the employees' minds about the binding effect of the cards. If all went as anticipated and the election were held, as it in fact was, the employees would have a chance to change their minds and vote against the Union. If the Union lost the election, then the employees would not be bound to the Union regardless of the fact that they had signed cards.

As indicated above, I further find accordance with the testimony to which I have referred, that when at the subsequent meeting of the organizing committee the question was raised as to the binding effect of the cards, Patrick explained that the cards would be used first to obtain an election, that the signers of the cards would not be joining the union at this time, that this would be deferred until after the Union had won the election and had succeeded in negotiating a contract satisfactory to the employees. In making this finding I do not wish to imply that Patrick conveyed this idea to all his hearers without any confusion on their part. It is clear to me that much confusion existed in the minds of the employees, including some members of the organizing committee, and that some genuinely believed that Patrick had expressly stated that the cards would be used only

for the purpose of an election and no other purpose. However, the question before me in ruling upon the Company's general contention that most of the cards relied upon by the Union are invalid because they were obtained through misrepresentations that they would be used only for the purpose of an election is whether Patrick in fact made such representations, regardless of the employees' understanding of his representations. I find that Patrick made no such representations. Accordingly, the Company's sweeping general contention regarding the invalidity of the cards is rejected. The Company's further contentions concerning the invalidity of certain cards because of representations made by union solicitors in individual cases are considered below.

iii. The Company's contentions regarding individual authorization cards

The Company does not make any specific objection (other than the general objection discussed in the preceding section) to the cards signed by the 62 employees listed in Appendix C. However, with respect to the remaining employees whose cards were received in evidence, the Company contends that their cards should not be counted toward the Union's majority for one reason or another. In addition, the Company challenges the bargaining authorization of Nancy Brown, listed on Appendix C, whose card became lost. Brown's credited testimony establishes that she signed a card on January 7 and mailed it to the Union that night. I find that Brown validly authorized the Union to act as her collective bargaining agent.

To facilitate the discussion of the Company's contentions I treat the employees in groups. I include in the first group those who attended the January 12 union meeting and who signed cards given them that

day, and as to whom the Company contends that Patrick misrepresented the purpose of signing the cards and therefore their cards should not be counted in ascertaining the Union's majority status. The 10 employees in this group are listed in Appendix D. My finding that Patrick did not make any misrepresentations regarding the cards either at the general meeting or the meeting of the organizing committee on that day disposes of the cases of these 10 employees.

Special circumstances regarding the cases of some of the employees in this and other groups discussed below require individual treatment.

Charlotte Hopkins—I include in this group because the only testimony cited by the Company in her case relates that what Patrick said at the January 12 meeting. However, the uncontradicted evidence is that Hopkins signed her card on January 9 and there is no claim made that any misrepresentations were made to her before she signed a card.

Linda Scott—Although Linda Scott, a member of the union organizing committee, did not sign a card until January 15, I include her in this group because the Company relies solely on Patrick's statements at the January 12 meeting as the basis for urging that Scott's card should not be counted. There is no evidence of any other representations made to her by any union solicitor before she signed a card.

I include in the next group of 18 employees who are listed in Appendix E all those as to whom I conclude there is no credible evidence of any representation before they signed their cards of such nature as would warrant disregarding their cards. As to a number of the employees in this group, the Company does not even contend that union solicitors made any such misrepresentations to them, for the evidence cited does not even suggest such fact. At most it indicates that

the employee or the solicitor entertained a belief that the only purpose of signing the cards was to obtain an election. The question before me, however, is whether any union solicitor made such misrepresentations to employees being solicited to sign authorization cards as would warrant disregarding the employees' act in signing an unequivocal bargaining authorization card. It is the statement of the solicitor which is material. Neither the belief of the solictor nor the belief of the employee being solicited, standing alone, has any relevance to the question before me. As to others in this group, the evidence shows that statements were made by union solicitors to the signers to the effect that the cards would be used to obtain an election. The making of references to an election was only natural since the election was part of the procedure which the Union contemplated would have to be used to establish the Union's bargaining rights in the plant. As stated hereinabove, the making of such statements alone does not justify nullifying otherwise valid bargaining authorization cards.

Grace Campbell—As I construe her testimony, Campbell testified that the only reason for signing a card stated by Larry Noble when he solicited her signature was that "he had to have so many cards signed before we could have a vote on the Union." This is not the kind of a representation which invalidates an otherwise valid authorization card.

Donald Neuenschwander—The Company relies on Neuenschwander's testimony as follows:

> TRIAL EXAMINER: . . . who got you to sign?
> The WITNESS: The name was Robert Repp . . . he explained to me, he says, "This is not to join the union or anything," he says, "All this is for is to get the union down here to talk to you." He says, "If you get so much per

cent it calls for an election." That is what the man stated to me.

The statement that the card would not effect Neuenschwander's membership in the Union was not a misrepresentation. Under the Union's normal procedure, the employees signing cards did not become members at that time. Whether they became members depended, first, on the Union wining the election, and second, on the Union's negotiating a contract acceptable to the employees. The remainder of Repp's statement to Neuenschwander is not sufficient in my opinion to overcome Neuenschwander's overt act in signing a card containing an express bargaining authorization.[32]

Rachel Schultz—The Company relies on Schultz' testimony that a woman whose name she could not recall gave her a card and stated something to the following effect: "You could sign the card and it would just be called—it would be so you could vote for the union, if you wanted to, or not. That is the way I understood." The foregoing vague statement by an undisclosed union solicitor in my opinion is not sufficient to invalidate an otherwise valid authorization card.

I include in Appendix F the employees whom the Company claims were misleading into signing cards by misrepresentation to the effect that the cards were to be used *only* for the purpose of obtaining an election and no other purpose, and regarding whom I find that no such limiting representation was made. It is true as to all of the employees in this category that

[32] Neuenschwander's support of the Union is established by reliable probative evidence. Neuenschwander was one of the first employees to become interested in the Union. Patrick had given him cards in December. Neuenschwander was the employee through whom Patrick arranged the first union meeting on January 12.

some reference was made to an election in the course of the solicitation of him to sign. However, with the exception of Renate Kerwick whose case is discussed below, none of the employees listed in Appendix F testified in their original examination by counsel for the Company as to their being told by a union solicitor that the cards were for the limited purpose of obtaining an election and for no other purpose. It was later, and only in response to leading questions put by counsel for the Company, or when shown the questionnaire which contained leading questions, that an answer was elicited which indicated that the solicitor purportedly made the disqualifying representation that the cards were only for the purpose of obtaining an election. In determining which portion of the witness' testimony is more reliable, that given in response to nonleading questions, I have taken into consideration the various factors discussed in connection with the resolution of the credibility problems raised by the conflicting testimony regarding Patrick's statements at the January 12 meeting. In view of all these factors I conclude that the testimony of the employees listed in Appendix F given in response to nonleading questions is more reliable, and that the inconsistent testimony developed in response to leading questions should not be given the effect of negativing the unequivocal bargaining authorization contained on the face of the card. See *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 919 (C.A. 6); *General Steel Products, Inc.*, 157 NLRB No. 59, 61 LRRM 1417, 1419.

Sue Aggers—The Company points to Aggers' testimony that Lillian Criqui told her, at some undisclosed time, possibly after she had signed a card, that "the only purpose of signing a card was for an election." The record shows, however, that it was Nancy

Brown, a member of the organizing committee, who solicited Aggers to sign a card, and that Lillian Criqui was not on the organizing committee. Brown did not make any representations to Aggers such as would invalidate her card.

Elwyn Hart—Hart did not impress me as a credible witness in general. She appeared over eager to give testimony favoring the Company. One moment she testified that she told Schultz, Van Gordon and Knouse the same thing about the purpose of signing a card, i.e., "just to hold an election" and the next moment she testified that she did not talk to any of them about signing cards. I do not credit Hart's testimony, in response to counsel's somewhat leading question, that Neuenchwander told her when he solicited her to sign a card that the "sole purpose was to hold an election."

Renate Kerwick—Kerwick was not given an opportunity to tell in her own words what her solicitor had told her when she was asked to sign a card because counsel for the Company at the outset asked Kerwick the following question to which an objection was sustained: "At the time you signed this union card . . . did any of the union representatives tell you it was for the sole purpose of getting a Labor Board election?" Later, when asked by Company counsel to relate the circumstances under which she signed a union card, Kerwick answered that Lila Benson told her "it was merely to get a Labor Board election, that was the only reason we should sign a card." I do not credit Kerwick's testimony as to what Benson told her before signing a card. Not only was it responsive to a leading question which suggested the critical part of the answer, but also Kerwick's testimony largely follows the pattern suggested by the Company's questionnaire. Of all the employees who took the stand in this case she was the only one who testified that the representa-

tion was made to her that if the Union got in the employees who failed to sign cards might be the first to be laid off. A question regarding such a representation was included in the Company's questionnaire. Considering Kerwick's testimony as a whole, and in view of my observation of her demeanor on the stand, I find Kerwick too amenable to suggestions to place any reliance on her testimony. Kerwick's testimony also demonstrates the obstacles to the ascertainment of the true facts in this case resulting from the use of questionnaires such as were used by the Company in this case.

Frances Knouse—Knouse testified in response to nonleading questions by Company counsel that she believed that it was Elwyn Hart who gave her a union card. Then the following testimony was elicited:

> Q. Did she say anything to you about the card?
>
> A. She said that the card was so that they could find out how many people would maybe be interested in finding out about the union.
>
> Q. Did she say anything else that you recall?
>
> A. No.
>
> Q. Did she say anything about an election?
>
> A. She mentioned that they were going to have these cards to see how many would be interested and maybe we would get an election.
>
> Q. Did she say anything about the election being the purpose of the cards?
>
> Mr. AUSLANDER: Objection, the witness has already answered the question.
>
> TRIAL EXAMINER: You may continue.
>
> (By Mr. ELLIOTT.) You may answer the question.
>
> A. No.

Later, when questioned about statements made to her by Laura Jordan, Knouse was unable to recall whether they were made before or after she signed

a union card. Then, after Company counsel refreshed Knouse's recollection by showing her the statement which she had given him after filling out the questionnaire, Knouse gave the testimony upon which the Company now relies in which Knouse stated that it was true, as stated in her statement, that Jordan had told her that "signing the card was just to get an election in the plant." Upon consideration of Knouse's testimony as a whole I am convinced that she had no recollection at the hearing that Jordan actually made the statement in question to Knouse before Knouse signed the card. Under all the circumstances I do not believe that Knouse's uncertain testimony regarding Jordan's purported statement to her is sufficient to require the invalidation of Knouse's card.

Larry Lindemann—The Company cites the following testimony with respect to Lindemann: [33]

> Q. (By Mr. Elliott.) To refresh your recollection, did the [Laura Jordan] tell you that the only reason for signing a card was to get an election?
>
> A. I can't remember. She may have said that. Well, I asked quite a few people, I can't remember who I asked. From what I recollect from people I asked said it was to see if there was an election.
>
> Q. That was the only purpose?
>
> A. Yes.

When first asked what Laura Jordan had told him about the card, Lindemann replied, "she didn't say anything." When asked whether Jordan had given a reason for signing the card, Lindemann answered. "No, she didn't say a reason." Then, the questions

[33] In its brief the Company inadvertently attributes this testimony to Lila Benson. I assume that it would want to make the same contention with respect to Lindemann, and am treating it accordingly.

first above quoted were asked and answered. I find the foregoing testimony too vague concerning both the time when this statement was purportedly made and also the precise nature of the representation made to warrant setting aside Lindemann's action in signing a card expressly authorizing the Union to represent him in collective bargaining.[34]

In the final group of employees, listed in Appendix G, are four employees as to whom the record indicates that representations were made by union solicitors before they signed cards, to the effect that the cards "were just to get the vote" or that, "the sole reason for signing was to get a Labor Board election." The cards of these four employees will not be counted in ascertaining the Union's majority status.

b. *Recapitulation*

I have found that 100 employees listed on Appendices C, D, E and F executed valid bargaining authorizations on or before January 19, 1965 (Appendix C, 62; Appendix D, 10; Appendix E, 18; and Appendix

[34] Laura Jordan testified as follows concerning her solicitation of Lindemann:

> I told him that we was trying to get the people to sign the cards so we could have an election in the plant and that there was no obligation to the union because we had to have the election and sign the contract of negotiation before we would have to join the union, approved by the people.

I find no misrepresentation involved in this statement. Jordan, like the other union solicitors contemplated that it would be the election which would decide the question of representation at the plant and that if the Union lost the election there would be no further obligation to the Union. This is the way it would have turned out had the Union lost the election and had not the Company, by its unfair labor practices, prevented the employees from freely expressing their desires regarding union representation.

E, 10). In addition, Anita Bitler, who is not listed on any Appendix, also validly executed a bargaining authorization card on January 13. These 101 employees constitute a majority of the employees in the appropriate unit on January 20, 1965, when the Company received the Union's letter requesting recognition and bargaining.

IV. *Conclusions of law*

1. By threatening employees with loss of benefits or other reprisals because of their union activities, granting a benefit to interfere with the employee's free choice of representatives, and coercively questioning employees concerning union matters the company has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. All production and maintenance employees at the Company's Emporia, Kansas, plant, excluding office clerical employees, salesmen, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act.

3. On and at all times since January 19, 1965, Amalgamated Clothing Workers of America, AFL–CIO, has been the exclusive bargaining representative of the employees in the aforesaid collective-bargaining unit.

4. By refusing on and after January 20, 1965, to recognize and bargain collectively with Amalgamated Clothing Workers of America, AFL–CIO, as the exclusive bargaining representative of the employees in an appropriate bargaining unit, the Company has engaged in unfair labor practices in violation of Section 8(a) (5) and (1) of the Act.

5. By laying off Dale Haney, James Hayes, Royal Defoor, Dennis Mendoza, Gary Wensue, John Siebuhr, Bibiano Sanchez, and Wayne Stockebrand on February 19, 1965, the Company has discouraged membership in the Union by discrimination in regard to their tenure or terms or conditions of employment, thereby engaging in unfair labor practices in violation of Section 8(a) (3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

V. The remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a) (1), (3) and (5) of the Act, my Recommended Order will provide that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Company's layoff of the eight employees on February 19, 1965, violated Section 8(a) (3) and (1) of the Act. My recommended order will provide for the reinstatement of all of the laid off employees except Bibiano Sanchez, with backpay from the date of the layoff to the date of the Company's offer of reinstatement. In the case of Sanchez, his backpay will terminate on March 31, 1965, the date on which the Company discharged him. In computing backpay, any employee's net interim earnings shall be taken into consideration, and the formulae set forth in *F. W. Woolworth Co.*, 90 NLRB 289, 291–293 and *Isis Plumbing & Heating Co.*, 138 NLRB 716, shall be followed. As to any employee to whom the Company has made an offer of full and unconditional reinstatement to his former or a substantially equivalent position (*Chase National Bank*, 65 NLRB

827, 828–829), the Company need not make a second offer of reinstatement.

As indicated above, an order to bargain collectively with the Union is appropriate to remedy the Company's violation of Section 8(a)(5) of the Act. Even in the absence of a refusal to bargain I would find this remedy appropriate in the circumstances of this case in view of the Company's violations of Section 8(a)(1) and (3) of the Act, which prevented the employees from exercising a free choice of representatives in the election. In view of my conclusions herein, my recommended order will provide for the dismissal of the pending representation proceeding, Case No. 17–RC–4687.

The unfair labor practices herein found, including discriminatory layoffs, are such as to indicate an attitude of opposition to the purposes of the Act generally. In these circumstances a broad cease and desist provision is necessary to effectuate the policies of the Act.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, the undersigned Trial Examiner hereby issues the following:

RECOMMENDED ORDER

The Respondent, Crawford Manufacturing Co., Emporia, Kansas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of benefits or other reprisals because of their union activities, granting benefits to interfere with the employees' free choice of representatives, coercively questioning employees concerning their union sympathies or activities, or in any other manner interfering with, restrain-

ing or coercing employees in the exercise of the rights guaranteed in the Act.

(b) Refusing to recognize and bargain collectively with Amalgamated Clothing Workers of America, AFL–CIO, as the exclusive bargaining representative of the employees in the appropriate unit set forth in the conclusions of law above.

(c) Discouraging membership in Amalgamated Clothing Workers of America, AFL–CIO, or any other labor organization, by laying off, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with Amalgamated Clothing Workers, AFL–CIO, as the exclusive representative of the employees in the appropriate unit set forth in the conclusions of law above.

(b) Offer immediate and full reinstatement to their former or substantially equivalent positions, if it has not already done so, to Dale Haney, James Hayes, Royal Defoor, Dennis Mendoza, Gary Wensuc, John Siebuhr, and Wayne Stockebrand, without prejudice to their seniority and other rights and privileges, and make each of them and Bibiano Sanchez whole for any loss of pay which he may have suffered as a result of its discrimination against him, in the manner provided in the section hereof entitled "The remedy."

(c) Notify Dale Haney, James Hayes, Royal Defoor, Dennis Mendoza, Gary Wensuc, John Siebuhr and Wayne Stockebrand, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military

Training and Service Act of 1948, as amended, after their discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts of backpay due.

(e) Post at its Emporia, Kansas, plant copies of the notice attached hereto marked Appendix A.[35] Copies of said notice to be furnished by the Regional Director for the Seventeenth Region, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Seventeenth Region, in writing, within 20 days from the receipt of this Recommended Order what steps it has taken to comply herewith.[36]

---

[35] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[36] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

The petition for certification of representatives in Case No. 17–RC–4687 is hereby dismissed.

Dated at Washington, D.C.

OWSLEY VOSE,
Trial Examiner.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT threaten employees with loss of benefits or with reprisals because of their union activities, grant benefits to interfere with the employees' free choice of representatives, coercively question employees about their union sympathies or activities, or in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed in the Act.

WE WILL NOT discourage membership in AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, or in any other union, by laying off or otherwise discriminating against employees.

WE WILL, if we have not already done so, offer immediate and full reinstatement to their former or substantially equivalent jobs to Dale Haney, James Hayes, Royal Defoor, Dennis Mendoza, Gary Wensuc, John Siebuhr and Wayne Stockebrand and will re-

imburse them and Bibiano Sanchez for any loss of pay they may have suffered as a result of their layoff. We will notify the above named employees, excepting Bibiano Sanchez, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL, upon request, recognize and bargain collectively with AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, as the exclusive representative of the employees in the appropriate unit set forth below:

> All production and maintenance employers at our Emporia, Kansas, plant excluding office clerical employees, salesman, guards and supervisors as defined in the Act.

All our employees have the right to form, join or assist any labor union, or not to do so.

CRAWFORD MANUFACTURING CO., INC.,
Employer.

Dated ---------- By ----------
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 601 E. 12th Street, 610 Federal Building, Kansas City, Missouri (Tel. No. FR 4–5282).

APPENDIX B

To our Crawford Employees:

This investigation is being conducted by the attorney for the Company in connection with unfair labor practice charges filed by the Amalgamated Clothing Workers Union with the National Labor Relations Board. Whether you give the information is entirely voluntary. This will have no effect on your job, and there will be no reprisals by the Company against you one way or another. We wish to assure you of this fact. We would appreciate having your answers to the following questions: (Use other side of sheet if necessary.)

1. Did you sign a union card under any of the following conditions or promises made to you by the Union or its agents? _____

(a) that a majority of employees had already signed union cards? _____

(b) that employees who did not sign union cards would lose their jobs? _____

(c) that if you signed a card, wages and other benefits would positively be increased and could not be reduced? _____

(d) that the sole purpose of signing a card was to get a Labor Board election? _____

If your answers to any of the above questions are "yes," would you relate in more detail what was said to you in this connection and by whom?

2. If you signed a union card, did you read what you were signing before you signed it? _____

3. Did anyone from the Company or its supervisors question you about your union sympathies or voting intentions? _____ If so, please relate what was said and by whom.

4. Did anyone from the Company or its supervisors ever tell you that (a) you would lose wages and other benefits if the Union were chosen in the election? ------ or (b) did they tell you that your wages and benefits would be determined by negotiations? ------ If your answer to (a) above is "yes," please explain fully what was said and by whom.

5. Did anyone from the Company or its supervisors tell you that they could discover how you voted, and that it would take action against those who voted for the Union? ------ If your answer is "yes," please explain fully what was said and by whom.

6. Did anyone from the Company or its supervisors inform you that they were aware of the employees' union activities and that they had kept union meetings under surveillance? ------ If your answer is "yes," please explain fully what was said and by whom.

7. Did anyone from the Company or its supervisors tell you that it would not engage in good faith bargaining in the event the Union won the election, or that the plant would move? ------ If your answer is "yes," please explain fully what was said and by whom.

8. Did anyone from the Company or its supervisors make any other remarks to you which you in any way regarded as interference, restraint, or coercion on you or your right to organize? ------ If your answer is "yes," please explain fully what was said and by whom.

I have read the above questions and have given the above answers. They are true to the best of my knowledge and belief and they were given by me after the attorney for the Company advised me that this information was voluntary on my part and there would be no reprisals in any event.

(Employee's Signature)

This investigation is being conducted by the attorney for the Company in connection with unfair labor practice charges filed by the Amalgamated Clothing Workers Union with the National Labor Relations Board. Whether you give the information is entirely voluntary. This will have no effect on your job, and there will be no reprisals by the Company against you one way or another. We wish to assure of this fact.

I have read the above and have given the above statement consisting of ____ pages. It is true and complete to the best of my knowledge and belief and was given by me after the attorney for the Company advised me that this information was voluntary on my part and there would be no reprisals in any event.

(Employee's Signature)

Appendix C

1. Henry Anstaett
2. Mary Aquilar
3. Steve Barnaby
4. Robert Bastin
5. Lila Benson
6. Susan Blount
7. Carol Bolen
8. M. Bucher
9. Carol Byrd (Yerkes)
10. Donna Cahoon
11. Mary Cisneros
12. Mary Clements
13. Mary Coffman
14. Gerald Combes
15. Harlan Combes
16. Lois Crawford
17. Lillian Criqui
18. Carl Cunningham
19. Georgia Elbe
20. James Gamer
21. Margaret Garrett
22. Sue Garrett
23. Dale Haney
24. James Hayes

25. Roberta Heins
26. Dewey Herron
27. Olive Hollar
28. Betty Howerton
29. Phyllis Johnson
30. Fred Kunkel
31. Nancy Lowry
32. Jean McElfresh
33. Dennis Mendoza
34. Gloria Mendoza
35. Chester Nelson
36. Larry Noble
37. Pat Noble
38. Virginia Ogleby
39. Margaret Peters
40. Harold Posey
41. Peggy Price
42. Jess Redding
43. Mildred Rhoads
44. Victor Rodriquez
45. Virginia Schlageter
46. Judith Schmidt
47. Billy Seeley
48. L. J. Siebuhr
49. Betty Smith
50. Charles Soendker
51. Charles Speer
52. Gary Speer
53. Wayne Stockebrand
54. Robert Tucker
55. Beverly Tyson
56. Carl Tyson
57. Shirley Van Gorden
58. Warren Vorhees, Sr.
59. Jerry Wathen
60. Harley Wenderott
61. Gary Wensuc
62. James Whalen

Appendix D

1. Gene Brent
2. Gary Hinderliter
3. Charlotte Hopkins
4. Wesley Kennison
5. William Lowman
6. Lena Lynch
7. Emelia Rangel
8. Linda Scott
9. Mary Silva
10. Clarence Soendker

Appendix E

1. John Bastin
2. Wilma Bischoff
3. Shirley Brockleman (Jones)
4. Nancy Brown
5. Grace Campbell
6. Roberta Dowell
7. Sandra Fraser (Soendker)
8. Lois Laura Jordan
9. John Joss
10. Ella Lawson
11. Ruth Long
12. Donald Neuenschwander

13. Cecil Nichols
14. Mary Peet
15. Shirley Poff
16. Rosa Powell
17. Rachel Schultz
18. Marcia Scott

Appendix F

1. Sue Aggers
2. James Baxter
3. Ada Dill
4. Elwyn Hart
5. Renate Kerwick
6. Frances Knouse
7. Nellie Lewis
8. Larry Lindemann
9. Betty Loucks
10. Sharon Moss

Appendix G

1. Lois Jarvis
2. James King
3. Melvin Lowman
4. Lois Wagner

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the

adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1050

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CRAWFORD MANUFACTURING CO., INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY L. BROWNE
CLIFTON L. ELLIOTT
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
Kansas City, Missouri 64105
FRANK A. CONSTANGY
CONSTANGY & PROWELL
1900 Peachtree Center Building
Atlanta, Georgia 30303
M. WALLACE MONCLURE, JR.
MONCLURE & CABELL
921 Ross Building
Richmond, Virginia 23219
Attorneys for Respondent Crawford Manufacturing Co., Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

INTRODUCTION 1

POINT I—The petition for a writ of certiorari seeks to have this Court review a decision by the Fourth Circuit Court of Appeals which turned solely on the finding that substantial evidence did not support the Board's order 3

POINT II—No conflict exists between the decision of the Fourth Circuit Court of Appeals and the decisions of the other circuits which have considered the issue presented in this case 7

CONCLUSION 14

Table of Cases

Bauer Welding and Metal Fabricators, Inc. v. *National Labor Relations Board*, 8 Cir., 358 F.2d 766 .....7, 8, 14

Happach v. *National Labor Relations Board*, 7 Cir., 353 F.2d 629 .....12, 13

National Labor Relations Board v. *American National Insurance Co.*, 343 U.S. 395 5

National Labor Relations Board v. *Cumberland Shoe Corp.*, 144 NLRB 1268, enfd., 351 F.2d 917 ....2, 6, 7, 8, 9, 10, 11, 12, 13

National Labor Relations Board v. *Dan Howard Mfg. Co.*, 7 Cir., ... F.2d ....., 67 LRRM 2278 ....6, 8, 11, 12, 14

National Labor Relations Board v. *Glasgow Co.*, 7 Cir., 356 F.2d 476 11

National Labor Relations Board v. *Gotham Shoe Mfg. Co.*, 2 Cir., 359 F.2d 684 13

National Labor Relations Board v. *Pittsburgh Steamship Company*, 340 U.S. 498 5

National Labor Relations Board v. *S. E. Nichols Co.*, 2 Cir., 380 F.2d 438 .....6, 8, 13, 14

National Labor Relations Board v. *Southbridge Sheet Metal Works, Inc.*, 1 Cir., 380 F.2d 851 .....10, 12

National Labor Relations Board v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609 .....6, 8, 9, 14

National Labor Relations Board v. *Winn-Dixie Stores*, 6 Cir., 341 F.2d 750, cert. den., 382 U.S. 830 5

United Automobile Workers v. *National Labor Relations Board and Aero Corp.*, D.C. Cir., 363 F.2d 702, cert. den., 385 U.S. 973 .....2, 11

United Automobile Workers v. *National Labor Relations Board and Preston Products, Inc.*, D.C. Cir., ... F.2d ....., 66 LRRM 2548 .....11, 12

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 .....2, 5, 7, 15

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INTRODUCTION

The National Labor Relations Board's Petition for a Writ of Certiorari asks this Court to review the evidence which may be considered in determining if a union organizer, when soliciting membership authorization cards,

made misrepresentations sufficient to preclude the union from obtaining representative status based on these cards. Certiorari has recently been denied in such cases.[1] E.g., *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, 385 U.S. 972; *National Labor Relations Board* v. *Winn-Dixie Stores*, 382 U.S. 830. This case involves a question of substantiality of evidence controlled by the rule in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474.

As the basis for granting review, the Board urges the Fourth Circuit erroneously rejected the *Cumberland Shoe* rule concerning solicitor misrepresentations and held that the "clear meaning of the union authorization cards could be impeached by testimony as to the employees' subjective reasons for signing the cards" (Pet. p. 13), thereby placing its decision in alleged conflict with other Circuit Courts of Appeals.

The Board's Petition should be denied. The Fourth Circuit did not hold authorization cards could be impeached by testimony of subjective intent and did not invalidate the cards "simply" on the belief of the employees. The Fourth Circuit applied the *Universal Camera* rule and determined invalidating misrepresentations were made by the card solicitor, adopting a rationale in accord with rationale of the other Circuits. (We shall show later that the conflict is not between the Circuits; the conflict is rather between the Circuits and the Board.)

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1. The Board frames the issue: ". . . whether and under what circumstances a union's representative status may be predicated on authorization cards. . . ." (Pet. p. 9).

POINT I

The Petition for a Writ of Certiorari Seeks to Have This Court Review a Decision by the Fourth Circuit Court of Appeals Which Turned Solely on the Finding That Substantial Evidence Did Not Support the Board's Order.

The Court, contrary to the Board, held there was not substantial evidence in the record considered as a whole to support the Board's finding that the union, when it demanded recognition, had a valid card majority. Contrary to the statement in the Board's "Question Presented,"[2] the evidence demonstrated some employees *were told* and others were led to believe that the sole purpose of the authorization cards was to obtain a Board representation election, and as a result many of the signing employees understood the cards would serve only that purpose. The Court so found, disagreeing however, with dissenting Judge Sobeloff, on the weight of the evidence and the number of cards invalidated.[3] The Court states:

> "The company contends that these cards did not count because they were signed under a misrepresentation of the union: that the purpose of the card was only to have an election to determine whether the employees desired the union to become their bargaining representative. It was not understood by the

2. The "Question Presented" appears on page 2 of the Board's Petition.

3. The Examiner invalidated four cards signed by the employees because ". . . representations were made by union solicitors before they signed cards, to the effect that the cards 'were just to get the vote' or that, 'the sole reason for signing was to get a Labor Board election.'" (Pet. App. C, p. 126). The Examiner found other employees testified that similar misrepresentations were made to them (Pet. App. C, pp. 118-125) but was not persuaded by this testimony because, *inter alia*, it was given in response to leading questions on cross-examination. This issue was not reviewed by the Court because it disposed of the cards generally before examining the individual cards.

employees, the company urges, as an immediate authorization to the union to act as their collective agent. The Board in the past quite frankly conceded that a card signed under the representation that its *sole* purpose was to obtain an election should not be accepted as an appointment of the union. Bauer Welding and Metal Fabricator's, Inc. v. NLRB, 358 F.2d 766, 775-776 (8th Cir. 1967)."

"The company's position is supported by the findings of the Board's Examiner . . ." (Pet. App. A, pp. 19-20).

The Court emphasized the Examiner found that the references by the union solicitor to the election

> ". . . *were interpreted by some of the employees at the meeting as indicating that the cards would be used only for the purpose of obtaining an election*"

that

> "There is much testimony concerning whether Patrick did or did not make such statements at this meeting . . ."

and that, in reply to employee questions concerning the card's purpose, Patrick

> ". . . answered, I find, that the cards would be used first to obtain an election, *that the signers of the cards would not be joining the Union at this time*, that this would be deferred until after the Union had won the election . . ." (Pet. App. A, pp. 20-21) (Emphasis is the Court's).

After reviewing the contentions and findings, the Court recognized it was ". . . obligated to scrutinize the entire record and ascertain whether there is substantial evidence for the Board's finding", found misunderstanding as to the purpose of the cards, and held:

> "Proof of such a prevalent and pervading misconception *when generated by the union organizers representations cannot be ignored.*" (Pet. App. A, p. 22) (Emphasis supplied).

In sum, the Court found "substantial evidence on the record considered as a whole" demonstrated a "prevalent and pervading misconception" as to the purpose of the cards which was "generated by the union organizers representations", for example, *"that the signers of the cards would not be joining the union at this time,* that this would be deferred until after the election . . ." (Emphasis is the Court's). In reviewing the substantiality of the evidence supporting (or not supporting as it turned out) the Board's order, the Fourth Circuit was performing a duty imposed on it by this Court. We submit that this Court should not grant certiorari to review the weight of the evidence in this case as that function should properly remain in the hands of the Court of Appeals. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474; *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498; *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395.

Clearly, the Fourth Circuit did not predicate its conclusion on the "subjective" intent of the signers. It did emphasize "the actual understanding of the signers" as to the purpose of the cards and found "misapprehension of their purpose", but found this relevant and persuasive evidence supporting the company's position that the cards were invalid because of solicitor representations as to the purpose of the cards. The Court quoted from the Sixth Circuit's decision in *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.,* 6 Cir., 341 F.2d 750, 754 (Pet. App. A, p. 23) that representations "to the effect that the only purpose of the card" is to obtain an election are entitled

to more weight than the card language.[4] Further, by rejecting the Board's narrow evidentiary rule underlying *Cumberland Shoe* as a "ghost of the parol evidence rule" and by emphasizing the "prevalent and pervading misconception" as to the purpose of the cards, the Fourth Circuit places itself squarely in line with the Sixth Circuit which has recently held such evidence:

> ". . . is relevant in assessing the effect of the solicitor's words, for it casts a telling reflection on the actual communication conveyed to the signer. The testimony of the signer as to his *expressed* state of mind is also relevant in determining whether his misapprehension over the purpose of the card was *knowingly induced* by the solicitor." *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 617.

This pronouncement of the Sixth Circuit is a particularly persuasive view of the relevancy of this evidence as it was that Circuit which granted enforcement to the Board's *Cumberland Shoe* findings and bargaining order. *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 6 Cir., 351 F.2d 917. The other Circuits are in accord: *National Labor Relations Board* v. *S. E. Nichols Co.*, 2 Cir., 380 F.2d 438, 443 (". . . at least three of the signers were induced to affix signatures by statements causing them to believe that the union would not receive representation status without an election."); *National Labor Relations Board* v. *Dan Howard Mfg. Co.*, 7 Cir., ... F.2d ....., 67 L.R.R.M. 2278, 2281 (". . . statements made

4. This language "to the effect that" was later italicized by the Sixth Circuit as indicating a rejection of the mechanistic "sole" or "only" words insisted upon in Board cases, see *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 617. Thus the misrepresentation found by the Court that ". . . the employees would not be joining at this time . . ." is sufficient to invalidate cards under the Sixth Circuit's *Cumberland Shoe* rule as explained. See pages 8-10, infra.

by Weiner created in Burdett's mind a misapprehension as to what signing the card meant . . ."); *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board,* 8 Cir., 358 F.2d 766, 774 (a letter ". . . succeeded in, creating the impression in the minds of the employees that the Union would become bargaining agent only by winning an election . . .").[5]

Thus, the "Question Presented" by the Board is not raised in the instant case, since the Court below invalidated the cards because "prevalent and pervading misconceptions" as to their purpose was "generated" by the organizers' misrepresentations.[6]

POINT II

No Conflict Exists Between the Decision of the Fourth Circuit Court of Appeals and the Decisions of the Other Circuits Which Have Considered the Issue Presented in This Case.

In the case at bar, the Board seeks to predicate its writ on an ostensible conflict between the circuits concerning the application of its *Cumberland Shoe* rule (Pet., pp. 12-14) by which the Board asserts it is "necessary to establish that the solicitor indicated to the signer that the card would be used *only* for a Board election" (Pet.,

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5. The Board would not consider such evidence as it concedes: "In view of the unreliability of testimony, given long after the event, as to the employee's subjective state of mind, the Board . . . has held that the act of signing an unambiguous authorization card cannot be impeached by the employee's later testimony that he believed he was signing for some other reason." This, at least, highlights the issue as one of testimonial reliability and, as such, more properly left to the Circuit Courts of Appeal to review on an *ad hoc* basis. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-911.

6. Indeed, the Board concedes that Patrick, the head solicitor, stated that the signers wouldn't be joining the union until "the Union had *won* the *election.*" (Pet., p. 4).

p. 12) before the card could be considered as vitiated in so-called "card-check" cases.

The Board cites the District of Columbia and First Circuits in alleged opposition to the Fifth and Fourth Circuits. As is shown, *infra*, there is no conflict among the circuits. The conflict rather is between the Board's application, on the one hand, of a rigid *per se* rule requiring an express declaration by the solicitor of "sole" or "only" purpose before the cards will be invalidated in determining a union's alleged majority and, on the other hand, the rulings by the several Courts of Appeals, which consider the whole body of evidence to determine whether the representations by solicitors, while not using the magic words, "sole" or "only," were calculated to and did create misunderstanding or misapprehension as to the purpose of the cards.[7]

The opposition which exists, not among the circuits but between the Board and the circuits, is fairly illustrated by *National Labor Relations Board* v. *Swan Super Cleaners, Inc,,* 6 Cir., 384 F.2d 609. The Sixth Circuit pointed out the Board's misinterpretation of *Cumberland*:

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7. There are many ways for a clever organizer to disguise the purpose of the cards without using the magic words "sole" or "only":

> ". . . he said it wasn't joining the Union, that they were just campaigning." *National Labor Relations Board* v. *Swan Super Cleaners, Inc.,* 6 Cir., 384 F.2d 609, 616.

> ". . . after he received a few more cards, there would be an election." *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board,* 8 Cir., 358 F.2d 766, 775.

> "To come to the meeting to see what we are doing." *National Labor Relations Board* v. *Dan Howard Mfg. Co.,* 7 Cir., ——— F.2d ———, 67 LRRM 2278, 2282.

> ". . . if I signed the card I would not be joining the union . . . in order to get the union in the store an election would have to be held in the store." *National Labor Relations Board* v. *S. E. Nichols Co.,* 2 Cir., 380 F.2d 438, 443.

The courts have found that such representations are invalidating.

> "It appears that the examiner's position was, and the Board's position now is, that unless the solicitor has actually employed the words 'sole' or 'only' in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any mechanical interpretation. The 'outright misrepresentation' referred to therein could certainly be accomplished by other words than 'sole' or 'only.' A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words*—'sole' and 'only'—employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed up for." 384 F.2d at 620.

The Sixth Circuit in *Swan* therefore found it necessary to clarify its enforcement of *Cumberland Shoe*, expressly disavowing the view that *Cumberland* held that the word "sole" or "only" was needed to invalidate a card.

> "We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'This card is for the *sole* and *only* purpose of having an election' *will* a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual word of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the cards is to obtain an election,* an invalidation of the card does not offend our *Cumberland* rule." 384 F.2d at 618.

The court expressly adhered to *Cumberland Shoe,* stating that its rule is not offended by invalidating cards no matter what style or wording is used by the organizer "if it is clearly calculated to create in the mind of the

one solicited a belief that the only purpose of the card is to obtain an election." 384 F.2d at 618. Although the Sixth Circuit, as have the other Courts of Appeals, rejected the Board's mechanistic approach, the Board has refused to accept the rationale of the several courts that the misrepresentations, while not couched in the exact terms "sole" or "only," may nevertheless, when weighed in the light of substantial evidence, invalidate the cards.

All circuits, we submit, including the Fourth Circuit in the case at bar, when presented with substantial evidence of misrepresentations which have led to misapprehension and misunderstanding of the purpose of the cards, have correctly rejected such cards as being a proper and binding designation by the employee signer of the union as his bargaining representative, without finding it necessary to subject each individual card to the "only" or "sole" purpose test.

The Board relies on the decisions of the Courts of Appeals in the District of Columbia and First Circuits, to show conflict, but neither the District of Columbia Circuit nor the First Circuit has adopted the rigid and mechanistic *per se* rule adhered to by the Board. The Board cites *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 1 Cir., 380 F.2d 851, 855-856 (Pet., p. 12). The court in that case did not accept the mechanical rule enunciated in *Cumberland Shoe*. Although it granted enforcement of the Board's order, it did so on the basis that substantial evidence showed there was no misrepresentation:

> "As to the alleged misrepresentation infecting nine of the authorization cards, the Board affirmed the Trial Examiner's findings on the ground that no purposes communicated to the employees purported to be the *sole* reason for signing the cards.

"After reviewing all of the testimony concerning each of the nine cards, we conclude that the Board's decision must stand. There is no evidence of such a 'hard sell' as would overcome the fact of signing a clearcut authorization card.

"Without going so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as a sole reason for signing, we have no hesitation in saying that here the representation that there would be an election does not invalidate Therrien's card. Cf. NLRB v. Gotham Shoe Mfg., 359 F.2d 684 (2d Cir. 1966); NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 920 (6th Cir. 1965)."

Thus, while granting enforcement, the First Circuit's articulated view is clearly consistent with the developments in other circuits, including the Fourth.

The Board also cites *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc.*, D.C. Cir., ... F.2d ....., 66 LRRM 2548, and *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, D.C. Cir., 363 F.2d 702, cert. den. 385 U.S. 973, as manifesting a conflict. However, in *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, the court did not discuss the "only" or "sole" purpose issue, but rather relied on an earlier Seventh Circuit decision, *National Labor Relations Board* v. *Glasgow Co.*, 7 Cir., 356 F.2d 476, 478-479, subsequently explained by *National Labor Relations Board* v. *Dan Howard Mfg. Co., infra,* with which the instant case is in accord, and made no reference whatsoever to *Cumberland Shoe.* The case, therefore, can hardly be regarded as showing conflict. In the *Preston Products* case, *supra,* the District of Columbia Circuit limited its acceptance of the Board's *Cumberland Shoe* doctrine and noted that, while it approved of the Board's general use of the rule,

> "It is entirely possible, of course, that in a particular case the credited evidence as to the circumstances under which the cards were signed would reveal such gross misstatement as to the union's intention, or as to matters unrelated to an election, that the Cumberland rule would not be applied by the Board. Nor would we require its application, for given such gross misrepresentation the employee's signature on the card could not be construed as a fair and free designation of the union as his bargaining agent. Thus, Cumberland does not articulate an absolute rule, but rather a useful and well founded rule of thumb." 66 LRRM at 2552.

This, too, has been the rule applied in the Fourth and Fifth Circuits and, as the Board has conceded, in the Second, Sixth, Seventh and Eighth Circuits (Pet., p. 13).[8]

In the Seventh Circuit, for example, the issue turned on the question of whether substantial evidence supported the representations made in connection with the signing of cards. That circuit, in *Happach* v. *National Labor Relations Board*, 7 Cir., 353 F.2d 629, 631, relied upon *Cumberland Shoe*. This reliance has been clarified by the same court in *National Labor Relations Board* v. *Dan Howard Manufacturing Co.*, 7 Cir., ... F.2d ....., 67 LRRM 2278:

> "We apply the restatement in Swan of the Cumberland rule and hold that 'in its total context' the only reasonable inference that can be drawn from the

8. The Board appears to take the position that the District of Columbia and First Circuits, if presented with a record containing substantial evidence of misrepresentation causing employees to misunderstand the purpose of the cards, would apply the mechanical interpretation of *Cumberland Shoe* urged by the Board in the case at bar. It is highly speculative to contend that the courts would slavishly adhere to a literal and mechanistic interpretation of what has been characterized as a mere "rule of thumb." See *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc., supra,* and *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra.*

> Weiner-Burdette colloquy, as testified to by her, is that *statements made* by Weiner created in Burdette's mind *a misapprehension as to what signing the card meant* and that her signature on the card did not represent an intention to designate the Union as her bargaining agent. We do not view this as a departure from the holding in Happach v. NLRB, 353 F.2d 629, a case relied on by the Board, *since we interpret Happach in the same manner as the Sixth Circuit interpreted Cumberland in its opinion in the Swan case.* 67 LRRM at 2281." (Italics supplied).

Again, the court was careful to note by appendix references the misrepresentations and found substantial evidence concerning misapprehension, which was not presented in *Happach.*

So, too, the Second Circuit, in *National Labor Relations Board* v. *S. E. Nichols Company,* 2 Cir., 380 F.2d 438, 442-445, rejected the mechanical approach urged by the Board, distinguished on the facts a prior Second Circuit case in line with *Cumberland Shoe* (*National Labor Relations Board* v. *Gotham Shoe Mfg. Co.,* 2 Cir., 359 F.2d 684, 686) and, on the basis of substantial evidence not supporting the Board's conclusion, allied itself with the other circuits:

> "But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law." 380 F.2d at 442.
>
> * * *
>
> "In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." 380 F.2d at 443.

Thus, all circuits have rejected the mechanical "sole" or "only" purpose test urged by the Board, and followed a broader basis for invalidating cards when confronted with substantial evidence demonstrating misrepresentations which, variously, ". . . caused [employees] to believe . . ."[9] or "generated misapprehension"[10] or were ". . . calculated to create a belief . . ."[11] or "succeeded in creating the impression in the minds of the employees . . ."[12]—all demonstrating preferences in descriptive word selection but certainly not a conflict as to an important and substantial rule of law.

CONCLUSION

The Fourth Circuit, in the case at bar, found that the Board's finding that the cards were not induced by misrepresentation was not supported by substantial evidence. In invalidating the cards found to be induced by "a prevalent and pervading misapprehension . . . generated by the union organizers' misrepresentations," the Fourth Circuit has aligned itself with the other circuits which have refused to stick mechanically to the literal phrasing of the cards when presented with such wholesale misunderstanding created by the union. As stated by this Court concerning review of substantial evidence questions:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is

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9. *National Labor Relations Board* v. *S. E. Nichols Co.*, 2 Cir., 380 F.2d 438, 443.

10. *National Labor Relations Board* v. *Dan Howard Manufacturing Co.*, 7 Cir., ... F.2d ....., 67 LRRM 2278, 2281; *Crawford Manufacturing Co., Inc.*, 4 Cir., 386 F.2d 367, 371.

11. *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 618.

12. *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board*, 8 Cir., 358 F.2d 766, 774.

substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or misapplied." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-91.

This is not such an instance and, therefore, for the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HARRY L. BROWNE
CLIFTON L. ELLIOTT
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
Kansas City, Missouri 64105
FRANK A. CONSTANGY
CONSTANGY & PROWELL
1900 Peachtree Center Building
Atlanta, Georgia 30303
M. WALLACE MONCLURE, JR.
MONCLURE & CABELL
921 Ross Building
Richmond, Virginia 23219
Attorneys for Respondent Crawford Manufacturing Co., Inc.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1191

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND CRAWFORD MANUFACTURING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JACOB SHEINKMAN,
CLIFFORD D. REZNICEK,
ROBERT J. RABIN,
Attorneys for Petitioner,
Amalgamated Clothing Workers of America, AFL-CIO.
15 Union Square West,
New York, N.Y. 10003,
(212) 255-7800.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
A. The facts and proceedings below	3
B. The Union's majority	7
Reasons for granting the Writ	9
1. Conflict with decisions of the Supreme Court	9
2. Non-compliance of the court with the Supreme Court's "substantial evidence" doctrine	10
3. Conflict among the Circuits	12
Conclusion	14
Appendix "E"	15

Cases Cited

Bauer Welding and Metal Fabricators v. National Labor Relations Board, 358 F. 2d 766 (C.A. 8)	13
Bernel Foam Products Co., 146 NLRB 1277 (1964)	4
Bryant Chucking Grinder Co. v. National Labor Relations Board, No. 30844, decided December 12, 1967, 67 LRRM 2017 (C.A. 2)	13
Cumberland Shoe Corp., 144 NLRB 1268 (1963), enforced, 351 F. 2d 914 (C.A. 6)	12, 13
Engineers and Fabricators v. National Labor Relations Board, 376 F. 2d 482 (C.A. 5)	13

PAGE

Furr's, Inc. v. National Labor Relations Board, 381 F. 2d 562, certiorari denied, 389 U.S. 840 13

International Ladies' Garment Workers Union v. National Labor Relations Board (Bernhard-Altman), 366 U.S. 731 9

Irving Air Chute Co. v. National Labor Relations Board, 350 F. 2d 176 (C.A. 2) 4

Joy Silk Mills, Inc. v. National Labor Relations Board, 185 F. 2d 732 (C.A.D.C.) Certiorari denied, 341 U.S. 914 ..... 9, 12

National Labor Relations Board v. Dan Howard Manufacturing Co., No. 16,154, decided January 11, 1968, 67 LRRM 2278 (C.A. 7) 13

National Labor Relations Board v. Logan Packing Co., No. 10,355, 66 LRRM 2596 9

National Labor Relations Board v. S.E. Nichols Co., 380 F. 2d 438 ..... 11, 13

National Labor Relations Board v. Sehon Stevenson & Co., No. 10,189, 66 LRRM 2603 9

National Labor Relations Board v. Southbridge Metal Works, Inc., 380 F. 2d 851 (C.A. 1) 12

National Labor Relations Board v. Swan Super Cleaners, Inc., No. 16,952, decided October 25, 1967, 66 LRRM 2385 (C.A. 6) 13

National Labor Relations Board v. Walton Manufacturing Company, 369 U.S. 404 10

United Automobile Workers v. National Labor Relations Board and Preston Products. Inc., No. 20,137, et al., decided November 14, 1967, 66 LRRM 2548 ..... 11, 12. 13

United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 9

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 ..... 10, 11

IN THE

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No.

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
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v.

NATIONAL LABOR RELATIONS BOARD AND
CRAWFORD MANUFACTURING CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Amalgamated Clothing Workers of America, AFL-CIO (referred to herein as the "Amalgamated" or the "Union"), Intervenor in the proceedings below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The Solicitor General filed a petition for certiorari in this case on behalf of the National Labor Relations Board on January 25, 1968.

Opinions Below

The opinion of the court of appeals, not yet officially reported, is contained in 66 LRRM 2529. The decision and order of the National Labor Relations Board is re-

ported at 161 NLRB No. 91 (1966). The court's opinion is contained in the Board's petition, App. A (pp. 15-33) and the Board's Decision and Order is contained in the Board's petition App. C (pp. 36-135) and at J.A. 11-111.[1] The opinion of the court below denying the Amalgamated's motion for rehearing is not contained in the Board's petition and is attached to the Amalgamated's petition as Appendix E.

Jurisdiction

The judgment of the court of appeals was entered October 27, 1967 (Board petition App. B, pp. 34-35.). The Amalgamated filed a motion for rehearing November 24, 1967, which motion was denied by the court of appeals December 6, 1967 (Appendix E, *infra,* pp. 15-16). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Where substantial evidence supports the finding of the National Labor Relations Board that eight employees were laid off on account of their union activity, may the court of appeals reverse the Board because it chooses to accept the company's explanation for the lay-offs?

2. Where substantial evidence supports the findings of the National Labor Relations Board: (a) that a majority of the employees in a unit appropriate for collective bargaining signed cards which clearly authorize the union to represent them for collective bargaining purposes; (b) that none of

[1] In order to avoid duplication of the record, references to proceedings below are keyed to the National Labor Relations Board's petition for certiorari (referred to herein as "Board petition"), as well as to the Joint Appendix in the court below (referred to herein as "J.A.").

the employees establishing said majority were told that the cards would be used solely to obtain a Board representation election; and (c) that the company by other acts and conduct engaged in unfair labor practices designed to dissipate the union's majority; may the court of appeals refuse to enforce a bargaining order based on such findings because it decides that the employees were confused as to the purpose of the cards?

Statute Involved

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are set forth in the Board's petition, Appendix D, pp. 136-138.

Statement

A. The facts and proceedings below

This case arises out of the Amalgamated's campaign to organize the employees of Crawford Manufacturing Company (referred to herein as the "Employer" or the "Company") at the Employer's Emporia, Kansas plant. The Union's representatives solicited employees to sign authorization cards designating the Amalgamated as their collective bargaining representative by telling them in straight-forward, accurate and thorough terms the steps the Union would take to obtain bargaining rights.

Authorization cards were first distributed to employees at the plant gate on January 7, 1965 [2] by Jay Dee Patrick, a national representative of the AFL-CIO acting on behalf of the Amalgamated. The cards were attached to a leaflet bearing the prominent heading "An Invitation to Join" the "ACWA" (Board petition pp. 44-45; J.A. 117-118,

[2] All dates are 1965 unless otherwise noted.

631-634). The language of the cards, set out below,[3] specifically states that it is an application for membership, authorizes the Amalgamated to represent the signatory in negotiations concerning conditions of employment, and makes no mention of an election whatsoever. The following day, Plant Manager Jones addressed all the employees and, as if to make plain the meaning of the cards, stated that "yesterday an outside union organizer handed all of our employees an invitation to join an outside union." (Board petition p. 45; J.A. 588-589).

At the Amalgamated's first organizational meeting, on January 12, Patrick read the cards to some 75 employees. He explained that the Union would demand recognition on the basis of the signed authorization cards, but pointed out candidly that the demand would probably be rejected and that it would then be necessary to proceed to an election[4] (Board petition pp. 49-50; J.A. 121-122, 133). Patrick

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[3] The card reads as follows:

APPLICATION FOR MEMBERSHIP

in the

Amalgamated Clothing Workers of America,
AFL-CIO

1627 LOCUST ST. ST. LOUIS (3) MO.

CEntral 1-9329

I, the undersigned, hereby apply for membership in the Amalgamated Clothing Workers of America, and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters, pertaining to wages, hours and other conditions of employment.

Name (Please sign): .....
Address: .....
Telephone Number: ..... Date: .....
Company: .....
Department: ..... Operation: .....

[4] This two-step procedure of demand for recognition followed by petition for election is a standard organizing method fully sanctioned by the Board and approved by the courts, see e.g. *Bernel Foam Products Co.*, 146 NLRB 1277 (1964); *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F.2d 176, 182 (C.A. 2).

told the employees to take the cards home, read and think about them and discuss the matter with their families, and return the cards to the Union in the envelopes provided (Board petition p. 50; J.A. 123).[5]

By January 18 the Union had received over 100 signed authorization cards from employees in an appropriate collective bargaining unit of 172 employees (Board petition pp. 52, 104-105). The Union thereupon made its written demand for recognition in the said unit, and petitioned the Board for an election. The Employer rejected this demand on January 20, by which time the Board had received the Union's election petition (Board petition pp. 43, 53-54; J.A. 621-623).

On January 19, Patrick held a second meeting, attended by about 72 employees. Patrick informed the employees that he had sent the Company a letter requesting recognition based upon the authorization cards and read the letter to them. He also told them that he had petitioned for a Board election in the event the demand was refused which, as he had previously advised them, he anticipated. He told the employees that they were free to withdraw their authorization cards, as suggested by the Company, and offered to help anyone who so wished to get his card back (Board petition p. 58; J.A. 135-136).

During the two and a half months between the commencement of the Amalgamated's organizing drive and the election, the Board found that the Employer engaged in a course of conduct which was designed to dissipate the Amalgamated's majority and constituted unfair labor practices. It held that the Employer repeatedly threatened employees with reduced benefits if the Union won the election; warned known key Union adherents of reprisals for their Union activity; coercively interrogated employees

[5] Between 10 and 20 employees returned their cards to Patrick at that meeting (Board petition p. 52; J.A. 123, 133). The others held their cards for a longer period of time.

about their Union activities; and, violated Section 8(a)(1) of the Act in other respects (Board petition pp. 94-104, 127). The court found that the Board had substantial evidence in the record to support these findings and sustained its order directing the Employer to cease and desist from these violations of the Act (Board petition p. 18).

But when it came to the Board's findings that the Employer violated Sections 8(a)(3) and 8(a)(5) of the Act—findings that in the opinion of dissenting Judge Sobeloff call for a more stringent remedy than "an ineffectual slap on the wrist"[6]—the court balked at sustaining the Board.

The day after the Employer and the Amalgamated signed a consent election agreement the Employer laid off eight employees only to recall them almost immediately after the Union lost the election held March 26. Relying upon the timing of the layoffs, the union activity of those involved and the transparency of the Employer's proffered economic justification, the Board held that these layoffs were discriminatory and violated Section 8(a)(3) of the Act (Board petition pp. 88-91). Without even raising the question whether substantial evidence supported the Board's findings the Court reversed because it independently concluded that there was "no acceptable basis for this discredit of the company" (Board petition pp. 18-19).

The Union was defeated in the election 85 to 69, with 8 challenged ballots. In order to effectively remedy the numerous violations of the Act by the Employer, the Board set the election aside and ordered the Employer to bargain with the Amalgamated on the basis of its majority status as demonstrated by the authorization cards. This remedy was not only predicated upon the finding that the Employer's refusal to bargain with the Union was in bad faith in violation of Section 8(a)(5) of the Act, but was granted

[6] Judge Sobeloff so characterized that portion of the remedy sustained by the court (Board petition p. 25).

because the Employer's conduct made it impossible to hold a free and fair election (Board petition pp. 102-104). The court refused to enforce the Board's bargaining order because it entertained a doubt that a majority of the employees validly designated the Union to represent them. So finding, the court did not reach the question whether the Employer violated Section 8(a)(5) of the Act or whether the remedy is appropriate (Board petition pp. 19-25).

B. The Union's majority

The Board sustained the Trial Examiner's reasoning and conclusion that 101 employees in an appropriate collective bargaining unit of 172 employees validly designated the Union to represent them. The Trial Examiner gave considerable weight to the uncontroverted facts that the card itself, in plain and unambiguous language, authorizes the Amalgamated to represent the employees; that Patrick read the card to an assembly of about 75 employees; that he subsequently read to about 72 employees a letter he had sent to the Employer requesting recognition on the basis of these authorization cards; and, that, at best, only one employee attempted to revoke his bargaining authorization, despite repeated requests by the Employer that the employees do so (Board petition pp. 115-116). The court does not dispute any of these facts and indeed affirms that at the second meeting Patrick told the employees he had used their cards as the basis of his demand for recognition (Board petition pp. 19-25). The Trial Examiner concluded that Patrick gave a straightforward, clear and truthful account of the uses to which the card would be put.

The Trial Examiner found that none of the 101 cards he counted as valid were procured by a representation that the card would be used *solely* for an election;[7] he

[7] The Trial Examiner rejected 4 of the 105 proffered cards on this basis, leaving 101 cards upon which he based the Union's majority (Board petition pp. 126, 138).

discredited testimony to this effect when given in response to leading questions or where inconsistent with credited testimony. In assessing the Employer's attack on the validity of the cards the Trial Examiner noted that the employees testified almost nine months after they signed their cards and appeared not to have a clear recollection at the time of the hearing of the representations made to them previously (Board petition p. 109). He considered the Employer's pre-trial interrogations [8] to unduly suggest to employees that they testify that they had signed the cards in order to obtain an election and noted that employees testifying in front of a hostile Employer would naturally wish to minimize the effect of signing an authorization card by stating it was for some purpose other than representation (Board petition pp. 110-112). For these reasons, he viewed with reasonable skepticism testimony inconsistent with the overt act of signing a valid and unambiguous authorization card.

The court, on the other hand, by taking some of Patrick's statements out of context [9] and without considering

---

[8] The questionnaire, distributed by the Company to practically every employee, is set out in the Board petition pp. 134-136 and at J.A. 558-587. The only question dealing with an election, No. 1(d), required the employee to use the word "solely" if he wished to state that representations were made to him about a Board election. It appears that after employees completed the questionnaire they were called in individually by the Company's attorney to amplify their answers. The Company's attorney then reduced their statements to writing using his own language, and had the employees sign or initial the resulting document, see *e.g.* J.A. 160-164, 191-195, 321-322.

[9] The court refers only to those representations by Patrick having to do with an election or application for membership, and completely ignores Patrick's statements that the cards would first be used to demand recognition (Board petition pp. 48-51, 116-118). Dissenting Judge Sobeloff cites the other relevant portions of the Board's Decision in footnote 3 of his dissent (Board petition pp. 26-27). With regard to Patrick's statements about joining the Union, he merely assured employees that their application for membership would not be acted upon until a contract had been successfully negotiated. (Board petition, pp. 117-118). The court's analysis is not directed at what Patrick said, but rather at the elusive subjective state of mind of the employees who signed cards.

in detail the testimony of even a single employee, rejected all 101 cards outright because it felt that employees were confused as to the purpose of the cards.

Reasons for granting the Writ

1. Conflict with decisions of the Supreme Court.

The Fourth Circuit has, in virtually all cases recently decided by it, rejected the notion that validly obtained authorization cards may create a duty to bargain with a union. If this is not apparent from the court's wholesale rejection of the authorization cards in this case, it is seen in two other recent cases in this circuit which must be read with the *Crawford* decision: 1) *National Labor Relations Board* v. *Logan Packing Co.*, No. 10,355, 66 LRRM 2596; and 2) *National Labor Relations Board* v. *Sehon Stevenson & Co.*, No. 10,189, 66 LRRM 2603, both decided October 27, 1967. While both cases could have been decided on narrow grounds (as pointed out by Judge Sobeloff in his separate opinion in *Stevenson*) the court condemned authorization cards as a predicate for demanding recognition except in "extraordinary cases." (66 LRRM at 2603.) This reasoning makes it virtually impossible for a union to obtain recognition through authorization cards unless the employer voluntarily grants such recognition, a result which is squarely in conflict with the Supreme Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; cf. *International Ladies' Garment Workers Union* v. *National Labor Relations Board (Bernhard-Altmann)*, 366 U.S. 731; see also *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914.

2. Non-compliance of the court with the Supreme Court's "substantial evidence" doctrine.

In *National Labor Relations Board* v. *Walton Manufacturing Company*, 369 U.S. 404, this Court reiterated the holding of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, in noting the Fifth Circuit's failure to apply the "substantial evidence" rule to discharge cases decided by the Board. In the instant case the Fourth Circuit has exceeded its scope of review in the same manner as that condemned in *Walton*.

In this case, there was substantial evidence in the record to support the Board's finding that eight employees were laid off because of their union activity, in violation of Section 8(a)(3) of the Act. The Board based its conclusion on the timing of the layoffs, the fact that union adherents were selected, and the failure of the Employer to support its alleged economic justification for the layoffs. In disposing of this entire issue in two short paragraphs (Board petition pp. 18-19), the court did not even consider whether substantial evidence supported the Board's conclusion. Rather, it cited the Employer's proffered economic justification and cryptically stated "we see no acceptable basis for this discredit of the company . . . we discern no falsification here".

At best, the facts give rise to two conflicting views as to the company's motivation for its conduct. But the court may not "displace the Board's choice" between these two possibilities, where the Board's conclusion is supported by substantial evidence, even though the court could have justifiably drawn a different inference if it had heard the case *de novo*. *Universal Camera, supra* at p. 488. The court below chose the Employer's explanation in spite of substantial evidence to support the Board's findings, thus ignoring this Court's instructions in *Walton* and *Universal Camera*. (*supra*)

The court's erroneous interpretation of its reviewing function also permeates its treatment of the authorization cards. Its approach should be contrasted with that of the D.C. Circuit in the recent case of *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc.*, No. 20,137, et al., decided November 14, 1967, 66 LRRM 2548. The D.C. Circuit upheld the finding of the Trial Examiner and the Board that employees validly designated the union as their collective bargaining agent and distinguished the recent decision of the Second Circuit in *National Labor Relations Board* v. *S.E. Nichols Co.*, 380 F. 2d 438, in which the Second Circuit made an independent review of the evidence. Commenting on this, the D.C. Circuit wrote:

> "The *Nichols* rule would require us to examine all relevant testimony in detail, to adjudge the credibility of each witness, and to weigh the evidence. Yet, as noted above, the Board is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge', *Universal Camera Corp.* v. *National Labor Relations Board, supra*, 340 U.S. at 488, and it would be difficult to imagine a topic more clearly within this specialized field than the evaluation of the significance of the circumstances under which authorization cards are solicited."

In this case, the Trial Examiner made numerous credibility findings, and the Board in sustaining these findings utilized its particular expertise in determining the validity of the authorization cards. In accordance with the scope of review delineated by *Universal Camera* and reiterated by the D.C. Circuit, these findings should not have been disturbed on review, when they were supported by substantial evidence.

3. Conflict among the Circuits.

The Board's bargaining order would have been sustained in the courts of appeal for at least two other circuits.

In *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra,* the D.C. Circuit upheld the Board's *Cumberland Shoe*[10] doctrine; that a clear and unambiguous authorization card may not be invalidated absent a representation to the signatory employee that the *only* purpose of the card is to secure an election. A similar view is taken by the First Circuit in *National Labor Relations Board* v. *Southbridge Metal Works, Inc.,* 380 F. 2d 851 (C.A. 1). Under the rulings of both courts a representation to an employee that the card will be used to obtain an election does not invalidate it, since such a use is consistent with the card's primary function of obtaining recognition. Both courts agree with the Board that the overt act of signing a clear authorization card is more reliable than the testimony of employees, in the presence of company officials, after the company has committed unfair labor practices. The two circuits also affirm the Board's doctrine that an employee's thoughts (or afterthoughts) as to why he signed a card cannot negate the overt act of having signed the card, *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 743 (C.A.D.C.) certiorari denied 341 U.S. 914. Since the Board in the instant case found that none of the 101 cards it counted towards the Amalgamated's majority are tainted by a representation that the card would be used *only* for an election, its bargaining order would be sustained in the D.C. and First Circuits.

In contrast with the above Circuits, the Fourth Circuit makes its own review of a cold record, ignoring the Board's expertise in the realities of organizing campaigns, and

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[10] *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enforced, 351 F. 2d 917 (C.A. 6).

determines what employees thought when they signed authorization cards. Only the Fifth Circuit, in *Engineers and Fabricators* v. *National Labor Relations Board,* 376 F. 2d 482 (C.A. 5), takes a similar view, chiding the Board for failing to probe "into the subjective intent of the challenged signers."

Recent decisions of several of the other circuits reflect a modified view of the *Cumberland Shoe* doctrine, e.g. *National Labor Relations Board* v. *S.E. Nichols Co., supra; Bryant Chucking Grinder Co.* v. *National Labor Relations Board,* No. 30844, decided December 12, 1967, 67 LRRM 2017 (C.A. 2); *National Labor Relations Board* v. *Swan Super Cleaners, Inc.,* No. 16,952, decided October 25, 1967, 66 LRRM 2385 (C.A. 6); *National Labor Relations Board* v. *Dan Howard Manufacturing Co.,* No. 16,154, decided January 11, 1968, 67 LRRM 2278 (C.A. 7); *Bauer Welding and Metal Fabricators* v. *National Labor Relations Board,* 358 F. 2d 766 (C.A. 8). The Tenth Circuit appears to continue to follow *Cumberland Shoe,* see *Furr's, Inc.* v. *National Labor Relations Board,* 381 F. 2d 562, *certiorari denied,* 389 U.S. 840. Several of the foregoing decisions explicitly point out the differences between their views and those of other circuits on the issue of authorization cards, e.g. *Bryant Chucking Grinder Co.* v. *National Labor Relations Board, supra,* 67 LRRM at 2019, 2020 (referring to C.A.D.C.; C.A. 2; and C.A. 6); *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra,* 66 LRRM at 2552 and 2555 (referring to C.A. 2 and C.A. 6); *National Labor Relations Board* v. *Swan Super Cleaners, supra,* 66 LRRM at 2392 (referring to C.A. 2); *National Labor Relations Board* v. *Dan Howard Manufacturing Co., supra,* 67 LRRM at 2280, 2281 (referring to C.A.D.C.; C.A. 2; and 6).

Thus, the conflict between the Circuit Courts is multiplying and requires a final resolution.

The Petitioner, an international union, which represents some 385,000 employees in almost every state in the United States, should not be subjected to such a variety of holdings depending upon the circuit in which jurisdiction lies to review or enforce a Board order.[11] The vital question whether employees can secure the representation rights guaranteed them under the Act and whether the Board can fashion remedies adequate to correct violations of the Act should not be left to jurisdictional happenstance. This Court should harmonize the conflict that now exists among the circuits.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

JACOB SHEINKMAN,
CLIFFORD D. REZNICEK,
ROBERT J. RABIN,
Attorneys for Petitioner,
Amalgamated Clothing Workers of America, AFL-CIO
15 Union Square West,
New York, N.Y. 10003,
(212) 255-7800.

Dated: March 1, 1968.

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[11] Jurisdiction in the instant case in the court below turned upon the location of the parent office of the Employer, and not upon the location of the plant in which the organizing drive took place.

APPENDIX "E"

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,040

CRAWFORD MANUFACTURING CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Intervenor.

Upon consideration of the petition of the intervenor, Amalgamated Clothing Workers of America, AFL-CIO, for a rehearing or a rehearing en banc, the court finds no grounds asserted therein which were not presented upon the initial argument of this case and considered by the court, and finds no reason justifying the rehearing.

Wherefore, it is ordered, with the concurrence of the other members of the court, that the said petition be, and it is hereby, denied.

SIMON E. SOBELOFF
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

Filed
Dec 6-1967

Margaret L. Davis
Chief Deputy Clerk

A true copy,
Teste:

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Chief Deputy Clerk,
U. S. Court of Appeals
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1191

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and CRAWFORD MANUFACTURING CO., INC.,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY L. BROWNE
CLIFTON L. ELLIOTT
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
FRANK A. CONSTANGY
CONSTANGY & PROWELL
1900 Peachtree Center Building
Atlanta, Georgia 30303
M. WALLACE MONCLURE, JR.
MONCLURE & CABELL
921 Ross Building
Richmond, Virginia 23219
Attorneys for Respondent Crawford Manufacturing Co., Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Introduction 1

Point I—The Layoffs 2

Point II—The "Card Checks" 3

Conclusion 5

TABLE OF CASES

National Labor Relations Board v. *Lifetime Door Company*, 4th Cir., ... F. 2d ..... (11,295, February 1, 1968) 4, 5

National Labor Relations Board v. *Logan Packing Co.*, 4th Cir., ... F. 2d ....., 66 LRRM 2596 5

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 3

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BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

Amalgamated Clothing Workers of America, AFL-CIO (referred to herein as the Union) has petitioned for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this matter.

The National Labor Relations Board has previously petitioned for a Writ of Certiorari in the same case, Case No. 1050. Respondent Crawford Manufacturing Company, Inc. (herein called the Company) has filed its brief in opposition to the Board's petition, but since the Union requests review of questions not presented by the Board, this brief response in opposition is submitted.

Point I—The Layoffs

The Union, unlike the Board, seeks to have this Court review the Fourth Circuit's determination that alleged discriminatory layoff of eight employees was not supported by substantial evidence.

The facts show that the layoffs in question, from various departments in the plant, occurred on February 19, 1965, during a "business slump." The particular employees were in departments where the loss was greatest. Company testimony to this effect was corroborated by business records. Employees selected for layoff were those having the lowest seniority, a practice followed by the Company for years. The Board arbitrarily minimized or disregarded this "contradictory evidence or evidence from which conflicting inferences could be drawn" and substituted its own "business" judgment for that of the Company. The Fourth Circuit denied enforcement, holding:

> However, we see no acceptable basis for this discredit of the company. Its officers testified to the business slump and cited company records in corroboration. We discern no falsification here. Even if mistaken, it was a managerial judgment not impeached as mala fide. (Board's Pet. App. A, pp. 18-19).

Thus, the Court found there was "no acceptable" basis to discredit the Company explanation and make a contrary finding. Accordingly this is not a case, as the Union

argues, where "substantial evidence" supports "two conflicting views." This is a case where substantial evidence did not support the Board's decision to reject the Company's explanation as pretextual. Nor was there substantial evidence to "impeach as mala fide" the Company's judgment. The Fourth Circuit, citing *Universal Camera Corp.*, refused to abdicate its judicial functions, and stated that its task was to determine "whether substantial evidence on the whole record" sustained the Board's findings. (Board's Pet. App. A, p. 16). The Court determined it did not.[1]

Point II—The "Card Checks"

As noted in our brief in opposition to the Board Petition for a Writ in Case No. 1050, the Fourth Circuit refused to enforce the Board's bargaining order based upon authorization cards, because the authorization cards were signed under a "pervading and prevalent misconception" as to the purpose of the cards "generated" by the union organizers' representations (Board's Pet. App. A, p. 22).

The Union requests review of this conclusion on the grounds that "The Fourth Circuit has, in virtually all cases recently decided by it, rejected the notion that validly obtained authorization cards may create a duty to bargain with a union." This assertion is in error. In our original brief in opposition, it was pointed out that the Fourth Circuit followed the judicially accepted view that authorization cards may be invalidated by misrepresentations of the solicitor, and that it did not predicate its conclusion

1. This is not a "credibility" case, but it is interesting to observe that in this case two separate Trial Examiners heard the evidence. The decision, which was by the second Examiner, discredited a witness for the Company who testified only before the first Examiner "in view of my observations of her demeanor on the stand" (J.A. 97). The finding was not disturbed by the Board.

upon the subjective intent of the signers. (Brief, p. 5). This has now been re-emphasized by the Fourth Circuit in *National Labor Relations Board* v. *Lifetime Door Company*, ... F.2d ..... (4th Cir. 11,295, February 1, 1968), wherein the Court recognized:

> The Courts have uniformly held that absent a good faith doubt as to the Union's majority, the employer is obligated to bargain [if the union has a card majority]. *NLRB* v. *Sehon Stevenson & Co.*, ... F.2d ..... (4th Cir. 1967). . . .

The Court went on to find "The record is barren of any evidence of a good faith doubt as to the reliability of the cards." It therefore granted enforcement of the Board's bargaining order which was based on validly obtained authorization cards. The concurring opinion of Judge Boreman further explained the Court's position in "card check" cases:

> We accepted in *Logan* the Board's finding of coercive questioning and surveillance of employees after the union's demand for bargaining; but we reached the conclusion that all of the specifics in the record tended to enhance, rather than diminish, the company's doubt of the union's claim and that if the company had any information tending to support the union's claim the record failed to disclose it. We refused to enforce the Board's order requiring the company to bargain with the union and rejected the finding that the company had refused to bargain in violation of the Act. However, we did recognize that the employer's duty to bargain follows actual recognition of union representation or under circumstances where recognition is wrongfully withheld when the union clearly represents a majority of the employees and the employer has no doubt of it. In short, on the facts in *Logan*, we concluded that there was no duty on the company to recognize the union or to bargain with it.

Crawford was decided by the Fourth Circuit on the same day as *Logan,* and the Court's reasoning on "card check" is the same in both cases, on the facts present in each.

We submit that the *Lifetime Door* case undercuts completely the argument of the Union (and the Board in its Petition) that the Fourth Circuit decisions are based upon "subjective intention," or that the Court is refusing to recognize authorization cards, validly obtained, without misrepresentation as to their purpose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Union's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HARRY L. BROWNE
CLIFTON L. ELLIOTT
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
FRANK A. CONSTANGY
CONSTANGY & PROWELL
1900 Peachtree Center Building
Atlanta, Georgia 30303
M. WALLACE MONCLURE, JR.
MONCLURE & CABELL
921 Ross Building
Richmond, Virginia 23219
Attorneys for Respondent Crawford Manufacturing Co., Inc.